No. 99-9136-CFY Title: Earthy D. Daniels, Jr., Petitioner
v.
United States

Docketed: April 19, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 12 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 19, 2000)
	Apr 12 2000	Motion of petitioner for leave to proceed in forma pauperis filed.
	May 10 2000	Order extending time to file response to petition until June 19, 2000.
	Jun 13 2000	Order further extending time to file response to petition until July 19, 2000.
	Jul 19 2000	Brief of respondent United States in opposition filed.
	Aug 3 2000	DISTRIBUTED for Conference of September 25, 2000
	Sep 8 2000	Motion of petitioner for leave to proceed in forma pauperis GRANTED.
	Sep 8 2000	Petition GRANTED. SET FOR ARGUMENT January 8, 2001. **********
	Oct 18 2000	Joint appendix filed.
	Oct 19 2000	Brief of petitioner Earthy D. Daniels, Jr. filed.
	Nov 16 2000	Order extending time to file government's brief on the merits to and including November 27, 2000.
	Nov 17 2000	Record filed.
	Nov 20 2000	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Nov 21 2000	Record filed.
	Nov 27 2000	Brief of respondent United States filed.
	Dec 5 2000	CIRCULATED.
	Dec 29 2000	Reply brief of petitioner Earthy D. Daniels, Jr. filed.
	Jan 8 2001	ARGUED.

99-9136

ORIGINAL

Supreme Court, U.S.
FILED
APR 12 2000
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

EARTHY DANIELS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Earthy Daniels, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender was appointed as counsel for Earthy Daniels in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

* * *

This motion is brought under Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender

99-9136

SUPREME COURT, U.S.
FILED
APR 1 . 2000
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

Earthy Daniels, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GUY MICHAEL TANAKA
Deputy Federal Public Defender
Counsel of Record
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Attorneys for the Petitioner

QUESTION PRESENTED

Under *Custis v. United States*, 511 U.S. 485 (1994), the defendant may not, at his federal sentencing proceeding, collaterally attack prior convictions (on grounds other than the denial of counsel) that are used to impose a fifteen-year mandatory minimum term under the Armed Career Criminal Act. This case presents the issue left open in *Custis*: whether the defendant may use federal habeas to reopen his federal sentence and challenge constitutionally infirm prior convictions that were used to enhance his sentence.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Earthy Daniels petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 195 F.3d 501 (9th Cir. 1999). *See* App. 1-4.

JURISDICTION

The Ninth Circuit Court of Appeals issued its order denying the petition for rehearing on January 13, 2000. *See* App 5. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act of 1984 (ACCA) codified in relevant part at 18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

This case involves a challenge under 28 U.S.C. § 2255 attacking the constitutionality of a prior state conviction used to enhance petitioner's federal sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Mr. Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court found that because Mr. Daniel's

prior California state convictions triggered the application of the ACCA, he was subject to a mandatory minimum term of 15 years.

After the sentence was affirmed on appeal, Mr. Daniels filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, alleging that the two predicate state convictions used to enhance his sentence were obtained in violation of the United States Constitution. He alleged that both of the state convictions resulted from involuntary guilty pleas. The district court denied the motion without reaching the merits of petitioner's constitutional claims. Instead, the court found that this Court's decision in *Custis v. United States*, 511 U.S. 485 (1994) precluded collateral attacks on the predicate state conviction on any ground other than the denial of counsel.

In a published opinion, the Ninth Circuit affirmed the district court's denial of 28 U.S.C. § 2255 petition. *United States v. Daniels*, 195 F.3d 501 (9th Cir. 1999). The court held: "In a § 2255 proceeding, *Custis* bars 'federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon*[1] claim.' *Id.* at 504 (citation omitted).

---

[1] *Gideon v. Wainwright*, 372 U.S. 335 (1963) (conviction obtained in absence of counsel violates Sixth Amendment).

REASONS FOR GRANTING THE WRIT

Did this court in *Custis* intend to preclude collateral attacks on expired state convictions where those convictions were obtained in violation of the Constitution and then used to enhance a federal sentence? The Ninth Circuit, in this case, says yes; the Fifth Circuit says no.[2] The conflict created by these decisions is intolerable on an issue that recurs so frequently that the Ninth Circuit characterized it as "quotidian." *Daniels*, 195 F.3d at 503. Moreover, the issue is important. Application of the ACCA to petitioner increased his minimum sentence by more than seven years, more than doubling his term. It results in like increases for others subject to its provisions. Thus, it is vitally important that this Court resolve the issue of whether the predicate felonies triggering application of the ACCA may be collaterally attacked. This case presents the perfect vehicle for resolving the conflict between the circuits.

1. There Is a Direct Conflict Between the Circuits

In *Custis*, this Court barred collateral attacks *at sentencing* (other than *Gideon* violations) of state convictions that formed the predicate for enhancement under the ACCA but left open the question of whether such attacks would be permitted on collateral review of the federal sentence.[3]

In *Clark*, the Fifth Circuit held that *Custis* did not preclude the defendant from collaterally attacking, by means of 28 U.S.C. § 2255 petition, the state court

---

[2] *United States v. Clark*, 200 F.3d 358 (5th Cir. 2000).

[3] *Custis* noted that the defendant could still attack his state court sentences in state court or through federal habeas review, and, if successful, could apply for reopening of any federal sentence enhanced by the state sentence. It expressed "no opinion on the appropriate disposition of such an application." 511 U.S. at 497.

convictions used to enhance his federal sentence. 203 F.3d at 370. *Clark* observed that although *Custis* expressed a preference for exhausting state court remedies and the federal habeas remedy under 28 U.S.C. § 2254 with respect to the prior convictions, it could not be read to preclude "initial resort to section 2255" where, because the defendant was no longer subject to custody under the state convictions, there was no other forum to challenge the constitutionally infirm prior. *Ibid.*

By contrast, the Ninth Circuit in this case has interpreted *Custis* to bar all federal habeas review of the validity of prior convictions (other than *Gideon* claims) used for federal sentencing enhancement. 195 F.3d at 504. The Ninth Circuit's opinion does not differentiate between state court convictions that are still subject to attack in state court or by 2254 petitions and state court convictions that are wholly expired and no longer subject to challenge. Indeed, the opinion appears to hold that even if a defendant succeeded in vacating the predicate conviction, federal habeas review is unavailable to challenge the enhanced federal sentence. It quoted its previous opinion in *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) for the proposition that a 2255 motion did not lie even where the defendant claimed that state conviction used to enhance his sentence under the ACCA became nonfinal when the appeal was reopened and was unconstitutionally obtained, because *Custis* barred all collateral attacks. *Daniels*, 195 F.3d at 503.[4]

The Sixth Circuit in *Turner v. United States*, 183 F.3d 474 (6th Cir. 1999) has taken an intermediate position, holding that the defendant must first challenge his state convictions in state court or by a 2254 action. Only after such an action is

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[4] This appears to be in accord with the position taken by the Eighth Circuit. *See Arnold v. United States*, 63 F.3d 708 (8th Cir. 1995)(defendant may not use a section 2255 motion to attack a prior state conviction used to enhance his federal sentence).

successful may he reopen his federal sentence.

Thus, there is no uniformity on the scope of federal review of constitutionally infirm state court convictions used to impose a fifteen-year mandatory minimum term under the ACCA. The Ninth Circuit bars all review other than *Gideon* claims; the Sixth Circuit allows review only where the predicate state court conviction has been overturned in an independent proceeding; and the Fifth Circuit allows review where there is no other forum to hear the claim. This Court should grant certiorari to resolve this irreconcilable conflict.

2. The Issue Is Important

If the district court finds that the ACCA applies, by virtue of a defendant's prior criminal convictions, it must impose a mandatory minimum term of fifteen years. In most cases, this dramatically increases the term that the defendant would otherwise be subject to under the Sentencing Guidelines. Yet, under the decision in this case, the defendant may not challenge that sentence even where the predicate prior was unconstitutionally obtained and the defendant can demonstrate that beyond doubt.

Moreover, the issue of whether a defendant may challenge an unconstitutional prior under section 2255 — where there is no other forum available — recurs frequently. A person, once sentenced to a minimum term of fifteen years, possess a much greater incentive to review expired state prior convictions than he possessed when the prior convictions were of no consequence. Thus, as the Ninth Circuit noted, the issue arises with great frequency, and this Court should grant certiorari to settle whether there is any remedy where one has received a sentence of at least fifteen years based on a prior conviction that was unconstitutionally obtained.

3. The Decision of the Ninth Circuit Is Wrong

The Fifth Circuit got it right; the Ninth Circuit has it wrong. *Custis* did not bar all collateral challenges to predicate state priors. *Custis* was careful to limit its holding to sentencing hearings and explicitly left open the availability of federal habeas review to challenge the constitutionality of the state prior conviction: the defendant could attack his "state sentences in Maryland **or** through federal habeas review." *Custis*, 511 U.S. at 497 (emphasis added). As the dissent emphasizes, the "Court's opinion makes clear that it uses the phrase 'collateral attack' to refer to an attack during sentencing." 551 U.S. at 498, n.1 (Souter, J., dissenting). Thus, *Custis* did "not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent that it was lengthened by a prior unconstitutional conviction." 551 U.S. at 512 (Souter, J., dissenting). And as the Fifth Circuit noted: "Justice Ginsburg, who concurred without reservation in *Custis*, has stated that '*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity.' *Nichols v. United States*, 511 U.S. 738 (1994)(Ginsburg, J., dissenting)." *Clark*, 203 F.3d at 367.

That makes good sense. As a matter of fairness, there is no reason to forbid challenges to a federal sentence where the defendant can prove that the prior conviction used to increase that sentence is invalid under the constitution. Nothing in *Custis* suggests that this Court intended to insulate such an unconstitutional sentence for all future review, and this Court should grant certiorari to correct this dangerous and erroneous misreading of *Custis* by the Ninth Circuit in this case.

CONCLUSION

For the foregoing reasons, Earthy Daniels, respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender
Counsel of Record

APPENDIX

under the circumstances there involved, where the litigation is between corporate entities, the failure to award costs to the prevailing party properly was considered an unjustified penalty. The appeal before us more closely involves the civil rights considerations set forth in *Stanley*.

While I concur in the majority's decision to remand for a determination of the proper costs, I assume that the majority agrees that in making its determination of the proper amount of costs, the district court in its discretion may consider whether there is a disparity of resources between the parties; the fact that this is civil rights litigation; the plaintiffs' partial success in securing modification of the CBest; the possibility that the cost award would render some or all of the plaintiffs indigent; the possibility that the cost award could chill future civil rights litigation, and any other appropriate factors.

Unlike the majority, however, I would allow the district court, in exercising its broad discretion, to award zero costs if the balance of factors so warrant. This result is supported by *Stanley*. In *Stanley*, this court found that the award of costs by the district court was an abuse of discretion because the district court had failed to consider all of the proper factors, namely the possibility that the cost award could render some or all of the plaintiffs indigent, or the possibility that the cost award could chill future civil rights litigation, and thus remanded the issue to the district court for reconsideration in light of those factors. If, on remand in this case, the district court properly considers the factors discussed above and then determines that given those factors, the appropriate cost award is zero, then under *Stanley*, I believe the district court would be acting within its discretion in awarding zero costs.

Federal Rule of Civil Procedure 54(d)(1) provides in part that "costs other than attorneys' fees shall be allowed as of course to the prevailing party *unless the court otherwise directs*; ..." (emphasis added). The district court's power in an appropriate case to "otherwise direct" is not limited. Yet, the majority engages in engrafting on the rule a requirement that "in no event may the court direct that no costs be awarded." While in some cases it would certainly be an abuse of discretion for a court to direct that no costs be awarded a prevailing party, we should not attempt to restrict the discretion granted the court so as to eliminate that possibility in all cases. Rule 54(d)(1) itself is broad enough to allow district court judges to deny all or a portion of the costs to the prevailing parties, and we should only interfere when they abuse their discretion. Because I disagree that in a civil rights case, a district court necessarily abuses its discretion when it denies all costs to a prevailing party, I respectfully dissent from that part of the majority's holding.

UNITED STATES of America, Plaintiff-Appellee,

v.

Earthy D. DANIELS, Jr., Defendant-Appellant.

No. 99-55097.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 30, 1999.

Decided Oct. 21, 1999.

Petitioner who was convicted of being a felon in possession of a firearm sought postconviction relief, challenging constitutionality of state convictions used in sentencing him under Armed Career Criminal Act (ACCA). The United States District Court for the Central District of California, William Matthew Byrne, Jr., J., denied relief, and petitioner appealed. The Court of Appeals, Fernandez, Circuit Judge, held that state convictions may not be collaterally attacked on motion to vacate, absent allegation that petitioner was denied right to counsel under *Gideon*.

Affirmed.

1. Criminal Law ⇐1139

Court of Appeals reviews de novo denial of petition to set aside, vacate, or correct federal sentence. 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.4

Petitioner who files motion to set aside, vacate, or correct federal sentence may not collaterally attack state convictions used to enhance petitioner's sentence under Armed Career Criminal Act (ACCA), unless that attack alleges denial of the right to counsel under *Gideon*. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 924(e); 28 U.S.C.A. § 2255.

Michael Tanaka, Deputy Federal Public Defender, Los Angeles, California, (argued); Carlton F. Gunn, Deputy Federal Public Defender, Los Angeles, California, for the defendant-appellant.

Daniel S. Goodman, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON, Circuit Judges.

FERNANDEZ, Circuit Judge:

Earthy D. Daniels, Jr., appeals the denial of his 28 U.S.C. § 2255 motion in which he sought to challenge the constitutionality of two state convictions, which were used in sentencing him under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). We affirm.

BACKGROUND

Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court determined that Daniels, who had four prior convictions, was subject to the ACCA and sentenced him to imprisonment for 17 months. Daniels appealed to this court. He asserted that the district court's conclusion that his two California burglary convictions constituted predicate offenses under the ACCA was incorrect. In an unpublished disposition, we rejected this assertion. *See United States v. Daniels*, No. 95-50044, 86 F.3d 1164, 1996 WL 292231, at * 3-4 (9th Cir. June 3, 1996).

Daniels then filed a § 2255 motion to set aside, vacate or correct his federal sentence, and collaterally attacked his two California robbery convictions, which were also used to enhance his sentence. Although he claimed that he had been unconstitutionally convicted, he did not contend that he was denied the right to counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in either case.

The district court denied his motion on the ground that he could not maintain this collateral attack under § 2255. He then appealed.

JURISDICTION AND STANDARD OF REVIEW

[1] We have jurisdiction pursuant to 28 U.S.C. § 2253(a). We review denials of petitions under 28 U.S.C. § 2255 *de novo*. *See Sanchez v. United States*, 50 F.3d 1448, 1451 (9th Cir.1995).

DISCUSSION

[2] In *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), the Supreme Court declared that

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except for *Gideon*[1] challenges, a defendant may not collaterally attack prior state convictions in sentencing proceedings where the ACCA is being used to enhance the sentence. The statute does not permit it. *See id.* at 490, 114 S.Ct. at 1735. The Constitution does not require it. *See id.* at 497, 114 S.Ct. at 1739. Concomitantly, ease of administration and the interest in finality argue against it. *See id.* at 496–97, 114 S.Ct. at 1738–39.

We have recognized the force of the *Custis* reasoning and have, therefore, expressly determined that it applies to sentencing proceedings in general. *See, e.g., United States v. Ricardo*, 78 F.3d 1411, 1415 (9th Cir.1996); *United States v. Price*, 51 F.3d 175, 177 (9th Cir.1995); *United States v. Alexander*, 48 F.3d 1477, 1494–95 (9th Cir.1995); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir.1994). In the same vein, we have decided that, on other than *Gideon* grounds, a defendant may not collaterally challenge a state conviction through the medium of a motion seeking dismissal of his indictment. *See United States v. Zarate-Martinez*, 133 F.3d 1194, 1199–1200 (9th Cir.), *cert. denied*, — U.S. —, —, 119 S.Ct. 123, 142 L.Ed.2d 99 (1998).

But, says Daniels, we have not yet decided that collateral attacks on state convictions cannot be brought under § 2255. If he were correct, we would doubt that they could be brought. Among other things, a § 2255 petition asserts that there was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever. As it is, Daniels is not correct.

In *Clawson v. United States*, 52 F.3d 906 (9th Cir.1995), a defendant brought a § 2255 motion and asserted that his federal sentence under the ACCA "was improperly enhanced through use of a state conviction that later became nonfinal when his appeal from the state judgment was reopened, *and* was unconstitutionally obtained." *Id.* at 907 (emphasis added). We responded:

> We hold that there is no finality requirement in the version of the ACCA under which Clawson was sentenced, *and* that under *Custis*, there is no constitutional right to collaterally attack the validity of a state conviction in a federal sentencing hearing on any basis other than denial of the right to counsel....

Id. (emphasis added). If that were not clear enough, we returned to the topic in a case which, though not a § 2255 matter, called upon us to expatiate on *Clawson*. We explained that, in *Clawson*, "[w]e read *Custis* to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras v. Schiltgen*, 151 F.3d 906, 907 (9th Cir.1998).

We believe that we have spoken with a good deal of clarity, but because Daniels does not find it so, perhaps others are of the same mind as he. We hesitate to leave uncertainty hovering about an issue that is so quotidian. Therefore, we restate our position here.[2]

CONCLUSION

We return to the § 2255 locale in order to clear away any bosk that still obscures our position regarding collateral attacks on prior convictions.

1. *See Gideon*, 372 U.S. at 342–45, 83 S.Ct. at 795–97.

2. Incidentally, Daniels's invocation of our decision in *Brock v. Weston*, 31 F.3d 887, 889–91 (9th Cir.1994), does not alter the result. That case dealt with a 28 U.S.C. § 2254 petition, which can be a vehicle for challenging state convictions in proper circumstances. *See id.* at 890–91 & nn. 6 & 7; *see also Allen v. Oregon*, 153 F.3d 1046, 1049–50 (9th Cir. 1998); *Gretzler v. Stewart*, 112 F.3d 992, 1004–05 (9th Cir.1997), *cert. denied*, 522 U.S. 1081, 118 S.Ct. 865, 139 L.Ed.2d 763 (1998); *Price*, 51 F.3d at 177. It is not relevant to this proceeding.

In § 2255 proceedings, *Custis* bars "federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras*, 151 F.3d at 907.

AFFIRMED.

Gilberto SEBASTIAN-SEBASTIAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 97-71045.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 11, 1998.[1]

Filed Oct. 25, 1999.

Alien, a native and citizen of Guatemala, petitioned for review of decision of Board of Immigration Appeals (BIA) denying asylum. The Court of Appeals, Wiggins, Circuit Judge, held that Court of Appeals was required to defer to BIA's implied finding that alien did not testify credibly regarding whether his persecution by guerillas was on account of an implied political opinion.

Petition denied.

Wiggins, Circuit Judge, concurred and filed opinion.

Brunetti, Circuit Judge, specially concurred and filed opinion.

Pregerson, Circuit Judge, dissented and filed opinion.

1. The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

1. Aliens ⇐54(5), 54.3(4)

Board of Immigration Appeals (BIA) made implied finding that alien's testimony was not credible when it found that alien's persecution by Guatemalan guerillas was not due to implied political opinion based on his brother's military service, and thus Court of Appeals was required to defer to such decision and deny asylum (Per curiam opinion of Wiggins, Circuit Judge, and opinion of Brunetti, Circuit Judge, concurring in result). Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

2. Aliens ⇐54.3(4)

Under the substantial evidence standard applicable to review of a decision of the Board of Immigration Appeals (BIA) denying asylum, a petitioner contending that the BIA's findings are erroneous must establish that the evidence not only supports that conclusion, but compels it. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

3. Aliens ⇐53.10(3)

An asylum applicant can establish a political opinion, as required to demonstrate asylum eligibility based on persecution on account of a political opinion, by means of an imputed political opinion. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

Christopher J. Stender, Stender & Larkin, Phoenix, Arizona, for the petitioner.

Regina Byrd, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the respondent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 13 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	No. 99-55097
	)	
Plaintiff-Appellee,	)	D.C. No. CV-98-00420-WMB
	)	
v.	)	ORDER DENYING PETITION
	)	FOR REHEARING AND
EARTHY D. DANIELS, JR.,	)	SUGGESTION FOR REHEARING
	)	EN BANC
Defendant-Appellant.	)	
	)	

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON, Circuit Judges

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of this court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

EARTHY DANIELS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Guy Michael Tanaka, hereby certify that on this 12th day of April, 2000, a copy of Motion for Leave to Proceed in Forma Pauperis, Affidavit and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were

//

//

mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for the Respondent.

Respectfully Submitted,

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender

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Attorneys for Petitioner
Earthy Daniels

ORIGINAL

No. 99-9136

Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether a defendant whose sentence was enhanced under a federal recidivist provision because of his prior state convictions, and whose state convictions have not been set aside by any court, may challenge his federal sentence under 28 U.S.C. 2255 based on the claim that the prior state convictions are constitutionally invalid.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-9136

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. 1-4) is reported at 195 F.3d 501. The opinion of the court of appeals affirming petitioner's conviction is unreported, but the judgment is noted at 86 F.3d 1164 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1999. A petition for rehearing was denied on January 13, 2000 (Pet. App. 5). The petition for a writ of certiorari was filed on April 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). He was sentenced, pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 176 months' imprisonment. The court of appeals affirmed, United States v. Daniels, 86 F.3d 1164 (9th Cir. 1996) (Table), and this Court denied review. Daniels v. United States, 519 U.S. 1094 (1997). Petitioner then filed a motion under 28 U.S.C. 2255 to set aside his sentence, arguing that two of his prior state convictions that were used to enhance his federal sentence were invalid. The district court denied the motion. The court of appeals affirmed. Pet. App. 1-4.

1. Petitioner was stopped in a high crime area for suspicious behavior, and police found that he was carrying a gun. He pleaded guilty to a state charge of possession of a firearm by a convicted felon and was sentenced to 16 months' imprisonment. State authorities referred the case to the United States Attorney's Office because petitioner fit the criteria for a career offender under the ACCA.[1] A federal grand jury then charged petitioner with possession of a firearm by a convicted

[1] Federal prosecutors obtained a waiver of the Petite policy (see Petite v. United States, 361 U.S. 529 (1960)), under which the Department of Justice generally refrains from bringing a successive prosecution after a state prosecution for substantially the same acts or transactions. See Executive Office for U.S. Attorneys, U.S. Attorneys' Manual § 9-2.031 (June 1998).

felon, in violation of 18 U.S.C. 922(g). The government sought an enhanced sentence pursuant to the ACCA, which requires a fifteen-year mandatory minimum term of imprisonment for any person who violates 18 U.S.C. 922(g) and who has three previous convictions for a violent felony or serious drug offense or both.[2] United States v. Daniels, No. 95-50044, 1996 WL 292231 (9th Cir. June 3, 1996).

In April 1994, a jury found petitioner guilty of violating Section 922(g). At sentencing, the district court determined that petitioner was subject to sentencing under the ACCA because he had four qualifying predicate convictions from state courts in California: two for robbery and two for burglary. C.A. Excerpts of Record (E.R.) 12-18; Gov't C.A. Br. 2-3. Petitioner appealed, arguing that his two California burglary convictions were not qualifying ACCA predicates. The court of appeals rejected that argument, holding that petitioner's burglary convictions satisfied the test set forth in Taylor v. United States, 495 U.S. 575 (1990). Daniels, 1996 WL 292231 at *3-*4 (9th Cir. 1996). On January 21, 1997, this Court denied a petition for a writ of certiorari. Daniels v. United States, 519 U.S. 1094 (1997).

2. On January 16, 1998, petitioner filed a motion under 28

[2] 18 U.S.C. 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years.

U.S.C. 2255, in which he challenged his federal ACCA sentence. He claimed that the two California robbery convictions used to enhance his federal sentence were unconstitutionally obtained. E.R. 28-54. Petitioner's motion did not state whether he had previously challenged the validity of either of those convictions in state court or on federal habeas corpus. Ibid.

Petitioner alleged that the first robbery conviction, which dated from 1978, was unconstitutionally obtained because his guilty plea was not intelligent and voluntary. According to petitioner, the only basis for his liability was aiding and abetting the robbery, and he did not know at the time of his guilty plea that he could be convicted as an aider and abetter only if he intentionally assisted the commission of the crime. E.R. 33-38. Petitioner's counsel stated that the transcript of the proceeding at which petitioner pleaded guilty to the 1978 robbery is not available. E.R. 33 n.3.

Petitioner alleged that the second robbery conviction, which dated from 1981, was unconstitutionally obtained for two reasons. First, as with his 1978 conviction, petitioner claimed that his guilty plea was not intelligent and voluntary. Second, petitioner claimed that his counsel for the 1981 conviction rendered ineffective assistance by failing to move to suppress a statement made by petitioner following an arrest that violated the Fourth Amendment. E.R. 38-47. Petitioner did not tender the transcript of the proceeding at which petitioner pleaded guilty to the 1981 robbery, and it is not in the record in this case.

3. The district court denied petitioner's motion under Section 2255 in a written opinion, holding that petitioner was precluded from collaterally attacking his expired state convictions in Section 2255 proceedings. E.R. 100-107. The district court relied on this Court's decision in Custis v. United States, 511 U.S. 485 (1994), and on later Ninth Circuit decisions applying the rationale of Custis to Section 2255 motions. E.R. 103-107. Custis holds that a federal defendant may not bring a collateral attack at his ACCA sentencing to the validity of prior state convictions used to enhance the ACCA sentence, with the sole exception of a claim that his prior conviction was obtained in violation of his right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963). See Custis, 511 U.S. at 487. As the district court noted, in Clawson v. United States, 52 F.3d 806, 809 (9th Cir. 1995) (per curiam), and Contreras v. Schiltgen, 151 F.3d 906, 907 (9th Cir. 1998), the Ninth Circuit applied Custis to preclude attacks on prior state convictions made through the vehicle of a Section 2255 challenge to the federal ACCA sentence. E.R. 106-107.

4. The court of appeals affirmed, reiterating its holdings in Clawson and Contreras that "[i]n § 2255 proceedings, Custis bars federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a Gideon claim." Pet. App. 4. The court found that the rationale of Custis extends both to sentencing proceedings in general and to collateral challenges to recidivist sentences

based on alleged defects in the prior conviction. Id. at 3.

DISCUSSION

Petitioner contends that this Court should grant certiorari on the question whether a defendant may challenge a federal sentence that was enhanced on the basis of prior state convictions by filing a motion under Section 2255 that alleges that the prior state convictions were unconstitutionally obtained. That question has divided the courts of appeals, recurs with frequency, as the court below noted, see Pet. App. 3 ("hesitat[ing] to leave uncertainty hovering about an issue that is so quotidian"), and is important to the stability of federal sentences. This Court should therefore grant the petition.

1. In Custis v. United States, 511 U.S. 485 (1994), the defendant was convicted of possession of a firearm by a convicted felon under 18 U.S.C. 922(g)(1) and was subject to an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), because he had three or more prior convictions for a "violent felony or serious drug offense." The defendant sought to avoid the enhanced penalty in his federal sentencing proceeding by claiming that his prior state felony convictions were flawed by constitutional violations. This Court held that, with the single exception of a claim that a prior conviction was obtained in violation of the right to counsel, a defendant may not collaterally attack his prior convictions in a Section 924(e) sentencing proceeding. Custis, 511 U.S. at 487. The Court reasoned that the ACCA, which "focuses on the fact of the

conviction," provides neither a direct nor implied statutory right to challenge the underlying convictions. Id. at 491. The Court further held that the Constitution does not require an opportunity to collaterally challenge prior state convictions before they are used to enhance a federal sentence. Id. at 493-497.

In challenging his prior convictions, the defendant in Custis claimed a "denial of the effective assistance of counsel, that his guilty plea [to one prior felony] was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial [on the other prior felony]." 511 U.S. at 496. The Court found that the defendant had no right to obtain review of those claims in resisting an ACCA sentence. Based on its precedent, the Court recognized a "unique," id. at 494, exception to the rule barring collateral attacks on prior sentences in federal sentencing proceedings that allowed claims that the prior conviction was obtained in violation of the right to counsel recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). Custis, 511 U.S. at 493-497. Custis declined to extend those holdings beyond Gideon claims, however.

The Court in Custis also explained that its holding was supported by concerns for "[e]ase of administration" and the finality of judgments. 511 U.S. at 496-497. The Court noted that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute

order," while other claims "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." Id. at 496. Furthermore, "principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing." Id. at 497. As the Court has frequently observed, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." Ibid. (internal quotation marks omitted). Those concerns, the Court noted, are heightened where the prior convictions "are based on guilty pleas." Ibid.

2. In the final paragraph of the opinion in Custis, the Court adverted to the question whether a defendant who was barred by Custis from challenging his prior state convictions in his federal sentencing proceeding would be able to attack those convictions by some other means. The Court stated:

> We recognize * * * that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. See Maleng v. Cook, 490 U.S. 488, 492 (1989). If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

511 U.S. at 497. Citing that language, the courts of appeals that have squarely addressed the issue have held that, if a federal defendant succeeds in having his prior state sentences

vacated, either by a state court or in federal habeas corpus review of those convictions under 28 U.S.C. 2254, he can then seek to reopen his enhanced federal sentence in a motion under Section 2255, arguing that the basis for enhancing his federal sentence is no longer valid. See, e.g., United States v. Walker, 198 F.3d 811, 813-814 (11th Cir. 1999); United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 201-202 (1st Cir. 1996); United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996); United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994).[3]

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[3] Petitioner characterizes (Pet. 5) the opinion of the court below as foreclosing a Section 2255 motion in those circumstances. If the Ninth Circuit had ruled that Section 2255 does not afford relief where a state conviction is valid at the time of sentencing but is later set aside by the jurisdiction that had entered it (or in federal habeas), and if that view were correct, it would follow logically that a defendant has no right to use Section 2255 proceedings as the vehicle for attacking the prior state convictions. The Ninth Circuit, however, had already decided in United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999), that a Section 2255 motion may be used to challenge a federal sentence that was enhanced by a prior state conviction that was later vacated. Nothing in the decision below precluding collateral attacks on the prior convictions under Section 2255 purports to overrule the court of appeals' prior decision in LaValle allowing resentencing under Section 2255 when a prior conviction has already been set aside.

The court of appeals in United States v. Clark, 203 F.3d 358, 368 (5th Cir. 2000), read the Eighth Circuit's opinions in this area to foreclose a Section 2255 attack on a federal sentence when a prior state conviction had been used for enhancement but was later vacated. None of the Eighth Circuit cases, however, involved a defendant who had already obtained invalidation of his prior convictions before launching his collateral attack on the enhanced federal sentence. See, e.g., Partee v. Hopkins, 30 F.3d 1011, 1012 (8th Cir. 1994) (precluding 28 U.S.C. 2254 attack on state sentence on the ground that it had been enhanced by prior state conviction that was unconstitutionally obtained), cert. denied, 513 U.S. 1166 (1995); Charlton v. Morris, 53 F.3d 929 (8th Cir. 1995) (precluding

This case, however, is in a different procedural posture. Petitioner has not alleged that he has already obtained a judgment from some other court that the prior convictions used to enhance his federal sentence were invalid. From all that appears in the record, petitioner either failed to employ the procedures available to attack those convictions or failed to win relief. Instead, he seeks to employ Section 2255 itself to bring the attack on his prior convictions. Custis holds that he could not bring that challenge during the federal sentencing proceedings. The logic of Custis dictates that he may not bring his collateral challenge to his prior convictions under Section 2255 either.

If a petitioner who is barred by Custis from using his federal sentencing proceeding to attack prior state convictions could nevertheless use Section 2255 to accomplish that same objective, it would reduce Custis to a curiously futile gesture. A defendant could simply wait for his federal sentencing proceedings to be completed, and then -- a day, or perhaps an hour, later -- file a Section 2255 motion asserting precisely the same attack on his prior convictions that he was precluded from mounting in his federal sentencing proceedings. As a practical matter, there is no justification for insulating the sentencing

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Section 2254 attack on expired state sentence used to enhance prisoner's federal sentence and stating that similar result would follow if prisoner's attack were construed as having been brought under Section 2255); see also Arnold v. United States, 63 F.3d 708, 709 (8th Cir. 1995) (precluding Section 2255 attack on sentence under 21 U.S.C. 841 and 851 on the ground that it was enhanced by prior state conviction that was unconstitutionally obtained).

court under Custis from having to adjudicate the collateral attack on the prior state convictions, while requiring it to address the same attack as soon as the sentence has become final. And as a theoretical matter, it is impossible to justify a rule that would give a defendant broader grounds to collaterally attack his sentence under Section 2255 than he would have had within the sentencing proceeding itself. See, e.g., United States v. Frady, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

The facts of this case graphically demonstrate why the court of appeals' conclusion follows directly from Custis. The grounds for petitioner's challenges to his prior convictions -- that his guilty pleas were not intelligent and voluntary and that his counsel provided ineffective assistance -- are identical to two of the grounds on which the defendant in Custis attacked his prior convictions. See 511 U.S. at 496 ("Custis attacks his previous convictions claiming the denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial."). This Court in Custis held that "§ 924(e) does not permit [the defendant] to use the federal sentencing forum to gain review of his state convictions." 511 U.S. at 497. The court of appeals in this case correctly apprehended that Custis necessarily leads to the

conclusion that the defendant similarly may not use a Section 2255 attack on the federal sentence to gain review of his state convictions. Otherwise, a defendant in the position of petitioner could bypass the Custis holding by bringing his Section 2255 attack immediately after sentencing, thereby gaining precisely the review that he was denied in the sentencing proceeding itself.

3. The courts of appeals are divided on the question presented here. The majority rule, adopted by the court below in this case, as well as the Sixth, Seventh, and Eighth Circuits, is that a defendant who has not previously obtained a ruling invalidating his prior convictions may not do so in a Section 2255 attack on his federal enhanced sentence. Ryan v. United States, No. 98-1736, 2000 WL 715005 (7th Cir. June 5, 2000) (challenge to sentence enhanced by prior convictions under career offender provisions of Sentencing Guidelines § 4B1.1); Smith v. United States, 213 F.3d 291 (6th Cir. 2000) (challenge to sentence enhanced by prior convictions under ACCA); Turner v. United States, 183 F.3d 474 (6th Cir. 1999) (same), cert. denied, 120 S. Ct. 1255 (2000); Arnold v. United States, 63 F.3d 708, 709 (8th Cir. 1995) (challenge to sentence enhanced by prior convictions under 21 U.S.C. 841 and 851). As the Seventh Circuit concluded in Turner (183 F.3d at 477):

> Essentially [the defendant] seeks relief from his state convictions in his habeas petition attacking his federal conviction. Custis does not support this tactic. We read Custis as requiring [the defendant] to challenge the underlying state convictions first in the state court or in an independent habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254. Only after [the defendant] succeeds in such a challenge can he seek to reopen his sentence in this case.

By contrast, the Fifth Circuit has held that a defendant in the same circumstances as petitioner may challenge his underlying state convictions in an attack on his federal sentence under 28 U.S.C. 2255. In United States v. Clark, 203 F.3d 358 (5th Cir. 2000), the defendant, like petitioner, was convicted of being a felon in possession of a firearm under 18 U.S.C. 922(g)(1), and he was subjected to the enhanced penalties authorized by the Armed Career Criminal Act based on his prior state convictions. Like petitioner, the defendant in Clark never obtained any ruling from any court -- either before or after his federal sentencing -- that his prior state convictions were invalid. Nonetheless, the defendant in Clark, like petitioner, sought to attack the constitutionality of his state convictions, on which he was no longer "in custody" within the meaning of 28 U.S.C. 2254, by way of a motion seeking to set aside his federal sentence under 28 U.S.C. 2255. The district court in Clark dismissed the defendant's Section 2255 motion, concluding that Custis precluded him from attacking his prior state convictions by means of an attack on his federal sentence. 996 F. Supp. 691.

The court of appeals reversed and remanded, holding that a defendant may obtain relief through a Section 2255 motion that would have been precluded under the rule in this case and in the Sixth, Seventh, and Eighth Circuits. Specifically, the court in Clark held that it "disagree[d] with the district court's

conclusion that Custis has rendered unavailable a section 2255 challenge to constitutionally infirm prior state convictions that have been used to enhance a federal sentence being currently served." 203 F.3d at 362-363. In the court's view, "[i]f [the defendant] has exhausted his state remedies and if he is not 'in custody' for purposes of a section 2254 challenge to his [prior state] convictions, then the district court should address [the defendant's] section 2255 petition." Id. at 370. The court added that relief should be withheld if defendant "would for any reason * * * not have been entitled to relief as to [the state convictions] in a section 2254 proceeding against an appropriate state respondent." Ibid. But a defendant who would have been entitled to relief in a Section 2254 proceeding attacking the prior state convictions (but for the fact that he is not "in custody" on those convictions) may obtain relief in a Section 2255 proceeding challenging the federal sentence that was enhanced on the basis of those convictions. The Fifth Circuit remanded the Clark case to the district court for a determination whether the defendant there could in fact make the showings that would entitle him to relief.[4]

4. The conflict between the majority view -- as embodied in the decision below and decisions of the Sixth, Seventh, and

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[4] In Clark, the Fifth Circuit expressly disagreed with the Eighth Circuit's holding in Arnold that claims of this sort could not be brought. See 203 F.3d at 368. In a more recent decision addressing a related matter, the Fifth Circuit expressly noted the conflict between its decision in Clark and the Sixth Circuit's decisions in Turner and Smith. See Pack v. Yusuff, No. 99-60283, 2000 WL 942919, at *4 (5th Cir. July 10, 2000).

Eighth Circuits -- and the Fifth Circuit's view in Clark is substantial and warrants this Court's review. As demonstrated by the increasing number of appellate opinions that have recently addressed the issue, defendants who are permitted to obtain relief from an enhanced federal sentence by attacking their prior state convictions will often seek to do so. There is no reason why defendants in the Fifth Circuit should be permitted to obtain relief from sentences under Section 924(e) and other similar federal provisions on grounds that would not lead to relief in the Sixth, Seventh, Eighth, or Ninth Circuits. Moreover, district courts and federal prosecutors in the Fifth Circuit after Clark -- unlike those in the Sixth, Seventh, Eighth, and Ninth Circuits -- will have "to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States," Custis, 511 U.S. at 496, to respond to challenges to state court convictions, such as the 1983 convictions at issue in Clark itself, see 203 F.3d at 360-361. Those substantial additional burdens should not be imposed on federal courts and prosecutors absent review by this Court.

The question presented in this case is distinct from the issues decided in Apprendi v. New Jersey, No. 99-478 (June 26, 2000), and in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Those cases address whether a jury must find beyond a reasonable doubt factors that enhance statutory maximum sentences. This case concerns whether a defendant may raise a constitutional challenge to the validity of prior convictions used to enhance a federal sentence. Such a legal challenge would be decided by a court, not a jury, whether or not the prior conviction enhances a defendant's statutory maximum sentence, and whether or not a jury was required to find that the fact of prior

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
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KATHLEEN A. FELTON
Attorney

JULY 2000

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conviction was established beyond a reasonable doubt. Accordingly, the question presented in this case is not affected by the Court's rulings in Apprendi and Almendarez-Torres.

IN THE SUPREME COURT OF THE UNITED STATES

DANIELS, EARTHY D.
Petitioner

vs. No. 99-9136

USA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** via fax and first class mail, postage prepaid, on this 19th day of July 2000.

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July 19, 2000

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No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed: April 12, 2000
Certiorari Granted: September 8, 2000

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CRIMINAL DOCKET FOR CASE NO. 93-CR-1042-WMB

ALL USA V. DANIELS

DATE	DOCKET NO.	DISPOSITION
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11/12/98	122	ORDER filed by Judge William M. Byrne Jr. as to Earthy D Daniels: denying motion to vacate, set aside or correct sent by a person in fed cust, 28:2255 [109-1] (cc: all counsel) [Entered 11/17/98] (step) [Entry date 11/17/98]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALFORNIA
October 1993 Grand Jury

UNITED STATES OF AMERICA,	)	CR-93-1042
Plaintiff,	)	**INDICTMENT**
v.	)	[18 U.S.C. § 9229(g)(1): Felon in Possession of a Firearm; 18 U.S.C. § 924(d)(1): Forfeiture of Firearm]
EARTHY D. DANIELS,	)	
Defendant.	)	

(Filed Dec. 10, 1993)

The Grand Jury charges:

[18 U.S.C. § 922(g) (1), § 924(d) (1)]

On or about October 11, 1992, in Los Angeles County, within the Central District of California, defendant EARTHY D. DANIELS, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed a firearm, that is, a Walther, Model PP, 7.65 mm semi-automatic pistol, serial number 387996, which had been shipped and transported in interstate and foreign commerce.

The Grand Jury further alleges that the above-mentioned firearm is subject to forfeiture.

A TRUE BILL

/s/ _____
Foreperson

TERREE A. BOWERS
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
DAVID C. SCHEPER
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, Defendant.	NO. CR 93-1042-WMB *NOTICE OF INTENTION TO SEEK ENHANCED PENALTIES PURSUANT TO 18 U.S.C. § 924(e) (1)* (Filed Jan. 18, 1994)

Plaintiff, United States of America, hereby gives notice that, in the event that defendant Earthy D. Daniels ("defendant") is convicted of the crime charged in the Indictment, the United States will contend that he should be sentenced pursuant to 18 U.S.C. § 924(e).

The United States' intent to seek a sentence under section 924(e) is predicated on defendant's prior convictions for three or more violent felonies and/or serious drug offenses, including but not limited to the following: his conviction on or about March 2, 1978, in Los Angeles Superior Court for robbery in violation of California Penal Code section 211; his conviction on or about November 5, 1979, in Los Angeles Superior Court for first degree burglary in violation of California Penal Code section 459; and his conviction on or about November 6, 1981, in Los Angeles Superior Court for robbery in violation of California Penal Code section 211.

DATED: January 18, 1994

Respectfully submitted,
NORA M. MANELLA
United States Attorney
RICHARD E. DROOYAN
Assistant United States Attorney
Chief, Criminal Division
/s/ Daniel S. Goodman
DANIEL S. GOODMAN
Assistant United States Attorney
Public Corruption & Government
Fraud Section
Attorneys for Plaintiff United
States of America

CERTIFICATE OF SERVICE BY HAND

I, Sharon Sansone, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by hand described in this Certificate was made; that on January 18, 1994, I hand delivered, in the above-entitled action, a copy of:

NOTICE OF INTENTION TO SEEK ENHANCED PENALTIES PURSUANT TO 18 U.S.C. § 924(e) (1)

Addressed to:

CARLTON F. GUNN, SDFP
Office of Federal Public Defender
1503 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

This certificate is executed on January 18, 1994 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Sharon Sansone
Sharon Sansone

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, JR., Defendant.	NO. CR 93-1042-WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SENTENCE (Filed Jan. 20, 1995)

The court, having considered the various pleadings filed by the parties regarding the sentence to be imposed in this matter and having considered the arguments of counsel at the sentencing hearings on June 28, 1994, January 10, 1995, and January 11, 1995, hereby makes the following findings of fact and conclusions of law regarding the sentence imposed.

1. The government has sought an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). A defendant who has been convicted of being a felon in possession of a firearm is subject to a mandatory minimum sentence of fifteen years in prison and a maximum sentence of life in prison if he is found to have three prior convictions for either a "violent felony" or "serious drug offense", or both, as those terms are defined in the Act. *See* 18 U.S.C. § 924(e). A defendant who is convicted or being a felon in possession of a firearm and is not found to be an armed career criminal is subject to a maximum prison sentence of ten years and no mandatory minimum sentence. *See* 18 U.S.C. § 924(a)(2). Defendant

has contested the government's claim that he should be found to be an armed career criminal and has argued that he is therefore subject only to the maximum sentence of ten years imprisonment.

2. The parties also dispute the application of certain Sentencing Guidelines factors. The government has sought a two-level upward adjustment for "obstruction of justice", pursuant to Section 3C1.1 of the Sentencing Guidelines. Defendant has sought a two-level or three-level downward adjustment for "acceptance of responsibility", pursuant to Section 3E1.1. The parties also disagree whether the Armed Career Criminal guideline applies. That guideline must be applied by the court if it finds the defendant to be an armed career criminal under 18 U.S.C. § 924(e). *See* U.S.S.G. § 4B1.4.

3. Defendant has also sought downward departures on two cases: (1) to reflect the year in prison that defendant has already served, and (2) on the ground that the offense conduct differs from that of a typical defendant prosecuted under the Armed Career Criminal Act. Lastly, defendant argues that the mandatory minimum sentence of 15 years contained in 18 U.S.C. § 924(e) refers to *combined* federal and state imprisonment and so includes the one year he served in state custody for his state conviction arising out of the same conduct.

ACCEPTANCE OF RESPONSIBILITY/
OBSTRUCTION OF JUSTICE.

A. OBSTRUCTION OF JUSTICE.

4. The government claims an adjustment for obstruction of justice is justified by defendant's testimony at the hearing on his motion to suppress evidence. *See* Government's Position With Respect to Sentencing Factors, at 2-3. At that hearing, defendant testified that he had his hand with the gun in the front pocket of his sweatshirt and did not withdraw the gun from his pocket until after he had run through a hole in a wrought iron fence and been told to freeze by police officers. The officers who arrested defendant testified that he already had the gun out of his pocket when defendant ran through the hole in the fence. This court found at the suppression hearing that defendant's testimony was not credible. *See* Court's Findings of Fact and Conclusions of Law filed March 23, 1994, Finding of Fact 11.

5. The court finds that the two-level upward adjustment for obstruction of justice should not be made under Section 3C1.1 of the Sentencing Guidelines, however. This adjustment applies only to testimony a court finds to be willful perjury, not testimony which is merely inaccurate. *United States v. Dunnigan*, 113 S.Ct. 111, 1116-17 (1993). The commentary to Section 3C1.1 indicates that inaccurate testimony "should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment (n. 1).

6. While the court did find that defendant's testimony was not credible, this did not constitute a finding that defendant lied, as opposed to simply being mistaken or having a faulty memory. The incident which defendant

and the officers testified about happened quickly, in the dark of night, while defendant was in a rush to escape. The difference between the officer's testimony and defendant's testimony is a matter of a few inches – whether his hand with the gun in it was still inside his pocket or whether it had been pulled out at some point while defendant was running or as he ducked to go through the hole in the fence. Defendant could have been unaware that he had taken his hand out of his pocket and/or forgotten this when he testified about it more than a year later.

B. ACCEPTANCE OF RESPONSIBILITY.

7. The government has argued against an adjustment for acceptance of responsibility based on the fact that defendant went to trial and contested factual guilt, in the form of argument by defense counsel that the officers were lying and framed him with a back up gun. *See* Government's Response to Defendant's Position with Respect to Sentencing Factors, at 3, 7-10. The government also argues that defendant's statements to the probation office and the court do not clearly demonstrate an acceptance of responsibility. *See id.* at 5-7. Defendant, on the other hand, argues that he is entitled to credit of acceptance of responsibility based on his plea of guilty to an identical offense in state court, his offer to plead guilty in this case, his authorship of a letter to the court admitting his guilt and expressing remorse even prior to trial, and his admission of guilt in an interview with the probation officer. *See* Defendant's Position Re: Sentencing Factors in

Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 12-13.

8. Section 3E.1 of the Sentencing Guidelines "authorizes reductions in sentences of defendants who are tried *as well as* of those who plead guilty." *United States v. Gonzalez*, 897 F.2d 1018 (9th Cir. 1990) (emphasis in original). "[A] defendant may not be denied the reduction solely on the basis that he chose to exercise his Sixth Amendment Right to go to trial." *United States v. Molina*, 934 F.2d 1440, 1450 n.12 (9th Cir. 1991). A defendant can receive credit for acceptance of responsibility even where defense counsel argues a defense theory which is entirely inconsistent with guilt, *see, e.g., United States v. Armijo*, 5 F.3d 1229, 1232, 1236 (9th Cir. 1993), and even when the defendant has actually testified and claimed an affirmative defense, *see United States v. Johnson*, 956 F.2d 894, 903-05 (9th Cir. 1992). While it is the "unusual case[ ]" in which a defendant who has gone to trial is able to demonstrate that he had accepted responsibility, it is possible. *See United States v. McKinney*, 15 F.3d 849, 852 (9th Cir. 1994).

9. The court finds that defendant is entitled to a two-level downward adjustment for acceptance of responsibility in this case. The court finds that this is one of those unusual cases in which a defendant who goes to trial can receive credit for acceptance of responsibility. The court is particularly influenced by the fact that defendant entered a timely plea of guilty to an identical offense in state court. This, in addition to defendant's admissions in his letter to this court and the interview with the probation officer, are sufficient to establish that he has accepted responsibility for his conduct.

10. The court rejects defendant's argument that he should receive an additional one-level adjustment under Section 3E1.1(b) of the guidelines. The defendant's guilty plea in state court and whatever statements he made at the time he was caught red-handed with a firearm do not constitute "timely providing complete information to the government concerning his own involvement in the offense" within the meaning of § 3E1.1(b)(1). Section 3E1.1(b)(2) is inapplicable because defendant did not plead guilty in the federal case but instead proceeded to trial.

OFFENSE LEVEL AND GUIDELINE RANGE PRIOR TO APPLICATION OF ARMED CAREER CRIMINAL ACT AND ARMED CAREER CRIMINAL GUIDELINE.

11. Based on the above findings, the court finds that defendant's offense level, criminal history category, and guideline range would be 22, VI, and 84-105 months, respectively, if the Armed Career Criminal Act and Armed Career Criminal Guideline did not apply. The court arrives at the offense level of 22 by finding the base offense level to be 24, pursuant to Section 2K2.1(a)(2) of the guidelines and than reducing that offense level by two for acceptance of responsibility, pursuant to Section 3E1.1(a), *see* supra. par. 8. The court finds that there should not be a two-level increase in the offense level based on a finding that the firearm defendant possessed was stolen, *see* 2K2.1(b)(4), because the government has conceded it is unable to prove that the firearm in question was stolen.

ARMED CAREER CRIMINAL ACT AND ARMED CAREER CRIMINAL GUIDELINE

12. In support of its claim that the Armed Career Criminal Act and Armed Career Criminal Guideline are applicable, the government has offered evidence of five prior "convictions". Two are the adult convictions for robbery which are described in paragraphs 53 and 64 of the presentence report. Two others are the first degree burglary convictions which are described in paragraphs 57 and 61 of the presentence report. The fifth is the 1975 juvenile adjudication described in paragraph 41 of the presentence report.

13. Defendant concedes that the two robbery convictions are "violent felonies" within the meaning of the Armed Career Criminal Act, though he has indicated that those prior convictions may be subject to a constitutional challenge which cannot be raised in this sentencing proceeding, *see Custis v. United States*, 114 S.Ct. 1732 (1994). Defendant argues that the two residential burglary convictions are not "violent felonies" within the Armed Career Criminal Act definition, however. *See* Defendant's Position re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 17-24. With respect to the juvenile adjudication, defendant argues, *inter alia*, that (1) he was not in fact "convicted" because the allegation in question was dismissed, (2) the allegation did not allege burglary or any other crime under California law, and (3) the allegation does not come within the more strict Armed Career Criminal Act requirements for consideration of juvenile adjudications, *see* 18 U.S.C. § 924(e)(2)(B). *See* Defendant's Position with Respect to Sentencing Factors and Response

to Government's Position with Respect to Sentencing Factors *Under Seal*, at 3-7, 24-29.

14. The court finds that defendant was convicted as an adult of robbery in 1978 and 1981 and was convicted of first degree burglary under California law in 1977 and 1979.

15. The court finds that the two robberies are "violent felonies" within the Armed Career Criminal Act definition. This is not contested by defendant, as noted supra par. 13.

16. The court also finds that the two residential burglary convictions in 1977 and 1979 are "violent felonies" within the Armed Career Criminal Act definition. The information, complaint, and plea documents in those cases demonstrate that the burglary charges to which defendant pleaded guilty in state court fall within the definition of burglary enunciated in *Taylor v. United States*, 495 U.S. 575, 599 (1990), namely, the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

17. Because the court finds that defendant is an Armed Career Criminal under 18 U.S.C. § 924(e) based upon his 1978 and 1981 robbery convictions and his 1977 and 1979 burglary convictions, the question of whether defendant's 1975 adjudication is an Armed Career Criminal Act predicate is moot. If this issue were not moot, the court finds that the government has not established that the juvenile "burglary" allegation was in fact sustained and found to be true. The petition was in two counts. Count one alleged a breaking into the defendant's mother's house. (P.C. 459). The records which have been

provided are sparse and ambiguous. The order of the juvenile court includes a sentencing form reading: "The petition filed ___ as to Paragraph(s) ___ is ___ true, and the petition is sustained, except that Paragraph(s) 1 is dismissed in the interest of justice." Government's Position With Respect to Sentencing Factors, Exhibit 5, at 3. While the box beside that sentence is not checked, there is the number "1" written in the blank preceding the words "is dismissed in the interest of justice." While the next sentence on the form is completed to read, "The petition filed 1-16-75 is true and sustained," and has the box beside it checked, the document is at least internally contradictory. The court is therefore unable to find that this allegation of the burglary was in fact sustained.

18. Based on the court's finding that defendant has four prior convictions for "violent felonies" within the Armed Career Criminal Act definition, the court finds that defendant is subject to sentencing under the Armed Career Criminal Act. This means that defendant's guideline range must be determined under the Armed Career Criminal Guideline. *See* U.S.S.G. § 4B1.4. Under that guideline, defendant's offense level is 33 less any adjustment for acceptance of responsibility. *See* U.S.S.G. § 4B1.4(b)(3)(B). Since the court has found there should be a two-level adjustment for acceptance of responsibility, defendant's adjusted offense level under this guideline is 31. Taken in conjunction with defendant's criminal history category of VI, his guideline range under the Armed Career Criminal Act Guideline is 188-235 months.

19. Defendant argues that a downward departure is appropriate because his offense conduct differs from that of a typical defendant intended to be prosecuted under

the Armed Career Criminal Act. He argues that he is eligible for such a departure because he merely possessed and did not use the firearm. The court rejects this argument because the statute on its face reaches all qualifying felons who possess guns and because the factor suggested by defendant has been incorporated into the Sentencing Guidelines. *See* U.S.S.G. § 4B1.4(b)(3).

20. Defendant has argued that the court should depart 12 months downward from this guideline range on the ground that he served 12 months in state custody for an identical offense. *See* Defendant's Position re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at 30. The government has stated that it does not oppose the court's giving the defendant a sentence that is 12 months lower than it otherwise would have, to take account of the time defendant served in state custody for his state conviction for the same act. *See* Government's Position with Respect to Sentencing Factors, at 9-10. The government has stated that if the court intends to sentence defendant at the bottom of the guideline range, it does not oppose a 12-month downward departure to account for the time in state custody. *See id.* The probation office has also recognized this as a potential ground for departure. The court agrees that a 12-month downward departure on this ground is appropriate, which would result in a sentence of 176 months.

21. Any statutory mandatory minimum sentence overrides the guideline range. *See United States v. Sharp*, 883 F.2d 829 (9th Cir. 1989). The government has taken the position that the Armed Career Criminal Act requires a mandatory minimum *federal* sentence of 15 years, and, if

this were so, the court would not be able to sentence defendant to anything less than 180 months. The defense, however, citing *United States v. Kiefer*, 20 F.3d 874 (8th Cir. 1994), takes the position that the 15-year mandatory minimum sentence required by the Armed Career Criminal Act is 15 years in total federal and state custody for the defendant's possession of the firearm. *See* Defendant's Supplemental Position re: Sentencing Factors.

22. This court adopts the reasoning of *Kiefer*, at least in the circumstances of this case, where the defendant was convicted in state court of the identical felon-in-possession of a firearm offense for which he has been convicted in federal court. The statutory language in the Armed Career Criminal Act requires that a defendant who is an armed career criminal "shall be . . . imprisoned not less than fifteen years," 18 U.S.C. § 924(e)(1), and does not indicate whether the word "imprisoned" refers to federal imprisonment alone or the total of federal and state imprisonment. The court agrees with the conclusion of the *Kiefer* court "that there would be no violation of the plain language of § 924(e)(1), and . . . various sentencing statutes would be properly harmonized, if § 924(e)(1) were construed to permit the sentencing court to give [the defendant] a . . . reduced federal sentence." *Kiefer*, 20 F.2d at 876. While the *Kiefer* court describes this is a form of "credit", *see id.*, it is not so much the giving of credit – which would arguably be inconsistent with *United States v. Wilson*, 112 S. Ct. 1351 (1992) – as it is a construction of the mandatory minimum sentence provision of 18 U.S.C. § 924(e).

23. Mr. DANIELS served one year in state custody for his possession of a firearm. Under *Kiefer*, this makes

the mandatory minimum *federal* sentence 14 years, *i.e.*, the mandatory minimum *total* sentence of 15 years less the one year served in state custody.

SENTENCE

24. In sum, the court finds there to be a mandatory minimum *federal* sentence of 14 years, finds the Guideline Range to be 188-235 months, and exercises its discretion to depart downward to 176 months, based on the time Mr. Daniels has already served in state custody. In conjunction with this custody sentence, the court imposes a five-year term of supervised release with the conditions orally announced at the January 11, 1995 sentencing hearing. The court finds that due to the defendant's inability to pay a fine, there should be no fine imposed, but does impose the $50 special assessment which is statutorily required. The court further orders that the firearm be forfeited to the government.

DATED: Jan 20, 1995 /s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States
District Judge

CERTIFICATE OF SERVICE

I, *Sandy Ear*, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney,

United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of California, at whose direction the service by hand delivery described in this Certificate was made; that on *March 5, 1998*, I delivered in the above-entitled action, in an envelope, a copy of: **GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBIT**

addressed to: Sylvia Torres-Guillen
Deputy Federal Public Defender
U.S. Courthouse, Suite 1503
312 North Spring Street
Los Angeles, CA 90012

at her last known address.

This Certificate is executed on *March 5, 1998*, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Sandy Ear
SANDY EAR

MARIA E. STRATTON
Federal Public Defender
SYLVIA TORRES-GUILLEN

NAME Deputy Federal Public Defender
Suite 1503, United States Courthouse

312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 894-4740

(ADDRESS or PLACE OF CONFINEMENT and PRISON NUMBER)
NOTE: *If represented by an attorney, his name, address and telephone number*

(Filed Jan. 16, 1998)

United States District Court
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	CASE NO. 98-0420 WMB (CR93-1042-WMB)
v.	
EARTHY D. DANIELS	(To be supplied by the Clerk of the U.S. District Court)
Full name of movant (include name under which you were convicted)	MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY
	28 U.S.C. § 2255

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

INSTRUCTIONS AND INFORMATION –
READ CAREFULLY

This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

Additional pages are not permitted. No citation or authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each judgment.

Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is: 312 N. Spring St., Los Angeles, Ca 90012

ATTN: Intake/Docket Section

Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court, Central District of California, Los Angeles, California

2. Date of judgment of conviction 1/11/95

3. Length of sentence 176 months Sentencing Judge Hon. Wm. Matthew Byrne

4. Nature of offense or offenses for which you were convicted 18 USC § 922(g)(1)

5. What was your plea? (Check one)

   (a) Not guilty (X)
   (b) Guilty ( )
   (c) Nolo Contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details _____

6. Kind of trial: (Check one)

   (a) Jury (X)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (X)

8. Did you appeal from the judgment of conviction? Yes (X) No_( )

9. If you did appeal, answer the following:

   (a) Name of Court U.S. Court of Appeals, Ninth Circuit, Supreme Court

   (b) Result Affirmed by Ninth Circuit; Certiorari denied by Supreme Court

   (c) Date of Result Ninth Cir. affirmance on 6/3/96; denial of certiorari on 1/21/97.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes ( ) No (X)

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court _____

    (2) Nature of proceeding _____

    (3) Grounds raised _____

    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

    (5) Result _____

    (6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you *did not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two:

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing THERE WAS NO PRELIMINARY HEARING.

(b) At arraignment and plea CARL F. GUNN and SYLVIA TORRES-GUILLEN, Deputy Federal Public Defenders. Office of the Federal Public Defender, L.A., [illegible]

(c) At trial same

(d) At sentencing same

(e) On appeal same

(f) In any post-conviction proceeding not applicable

(g) On appeal from any adverse ruling in a post-conviction proceeding not applicable

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at approximately the same time?
Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: _

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed sentence to be served in the future?

Yes ( ) No ( )

WHEREFORE, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

/s/ Sylvia Torres-Guillen
Signature of Attorney (if any)

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on 1-13-98
(Date)

/s/ Earthy Daniels
Signature of Movant

EARTHY D. DANIELS
(Petitioner)

UNITED STATES OF AMERICA
(Respondent[s])

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, EATHY D. DANIELS, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed?
Yes ____ No X

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

1-2-94 160 a month G.P.

2. Have you received, within the past twelve months, any money from any of the following sources?

a. Business, profession or form of self-employment?
Yes ____ No X

b. Rent payments, interest or dividends?
Yes ____ No X

c. Pensions, annuities or life insurance payments?
Yes ____ No X

d. Gifts or inheritances?
Yes ____ No X

e. Any other sources?
Yes ____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?

Yes ____ No X

(Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is yes, describe the property and state its approximate value. _____.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. none

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on 1-15-98
(Date)

/s/ Earthy Daniels
Signature of Movant

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined, I further certify that Petitioner likewise has the following securities to his credit according to the records of said _____ institution: _____

_____
Authorized Officer of Institution

_____
Title of Officer

_____

28 U.S. CODE, SEC. 2255

§ 2255. Federal Custody: remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show the the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. As amended May 24, 1949, c. 139, § 114, 63 Stat. 105.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On April 20, 1994, Earthy D. Daniels, Jr., was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The government sought an enhanced sentence under the Armed Career Criminal Act, which is codified in 18 U.S.C. § 924(e). The prior adult convictions which the government relied on were two California burglary convictions and two California robbery convictions.

Mr. Daniels argued that he was not an armed career criminal. He argued that the two burglary convictions were not categorically "violent felonies" under the Armed Career Criminal Act. *See* Defendant's Position Re: Sentencing Factors and Response to Government's Position With Respect to Sentencing Factors *Under Seal*, at pages 17-24, filed June 13, 1994. He did not challenge consideration of the robbery convictions on this ground, because such convictions do categorically satisfy the Armed Career Criminal Act definition of "violent felony". *See, e.g., United States v. Alvarez*, 972 F.2d 1000, 1006 (9th Cir. 1992). Mr. Daniels did note that the prior robbery convictions might be constitutionally invalid but recognized that he could not raise that claim at sentencing, in light of the recent Supreme Court decision in *Custis v. United States*, 511 U.S. 485 (1994). *See* Defendant's Position Re: Sentencing Factors and Response to Government's Position with Respect to Sentencing Factors *Under Seal*, at page 17. The two robbery convictions were a

March 2, 1978 conviction, and a November 6, 1981 conviction.

This Court rejected Mr. Daniels' argument that the burglary convictions were not categorically "violent felonies" and imposed the fifteen-year mandatory minimum sentence required by the Armed Career Criminal Act.[1] *See* Findings of Fact and Conclusions of Law Re: Sentence, at ¶¶ 16-17 and 21-24, filed January 20, 1995. Mr. Daniels thereafter appealed to the United States Court of Appeals for the Ninth Circuit, but that court affirmed this Court's decision on June 3, 1996. *See United States v. Daniels*, 86 F.3d 1164 (9th Cir. 1996) (table). Mr. Daniels then filed a petition for writ of certiorari with the Supreme Court, which was denied on January 21, 1997. *See Daniels v United States*, 117 S.Ct. 773 (1997).

Mr. Daniels now brings his challenge to the use of the prior robbery convictions to enhance his sentence under the Armed Career Criminal Act. While such a challenge was precluded at the original sentencing hearing, it is permitted under 28 U.S.C. § 2255. The Court should hold a hearing and, for the reasons set forth below, find that Mr. Daniels' enhanced Armed Career Criminal Act sentence is constitutionally invalid because it is based on two constitutionally invalid prior convictions.

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[1] Following the Fourth Circuit's decision in *United States v. Kiefer*, 20 F.3d 874 (4th Cir. 1994), the Court reduced Mr. Daniels' federal sentence by the period of time he had served in state custody on a state conviction for the same offense. The actual federal sentence imposed was 176 months.

II.

ARGUMENT

A. THE COURT MUST CONSIDER THE CONSTITUTIONAL VALIDITY OF ANY PRIOR CONVICTION WHICH AFFECTS A SENTENCE CHALLENGED BY A DEFENDANT IN A 28 U.S.C. § 2255 MOTION.

In a line of cases beginning with *Maleng v. Cook*, 490 U.S. 488 (1989), the Supreme Court and Ninth Circuit have recognized that a defendant who is challenging a sentence under 28 U.S.C. § 2255 may challenge the constitutional validity of any prior conviction which enhances or otherwise affects the sentence he is challenging. In *Maleng*, a defendant who had been convicted of robbery in 1958 and been convicted of robbery again in 1978 sought both to directly challenge the constitutional validity of the 1958 conviction and to challenge the enhancement of the 1978 sentence as a result of the 1958 conviction. *See id.* at 489. The Supreme Court held that the defendant could not directly challenge the 1958 conviction because he was no longer "in custody" as a result of that conviction. *See id.* at 491-92. The Court held that the defendant could challenge the 1978 sentence, however. *See id.* at 493.

While the Supreme Court in *Maleng* "express[ed] no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentence which it was used to enhance," *id.* at 494, that issue was addressed by the Ninth Circuit in *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990). In *Feldman*, a habeas petitioner sought to directly attack a prior conviction which

he claimed the United States Parole Commission had used in setting his parole date on a subsequent sentence. *See Feldman*, 902 F.2d at 1447. The Ninth Circuit read *Maleng* as precluding a direct attack on the prior conviction but held that it must construe the defendant's habeas petition "as an attack on petitioner's current federal sentence as enhanced." *Feldman*, 902 F.2d at 1449. The Ninth Circuit then remanded the matter to the district court and ordered that the district court resolve the defendant's claim that the challenged conviction was invalid if the district court determined that the Parole Commission had relied on the conviction. *See Feldman*, 902 F.2d at 1449.

The Supreme Court addressed the question again in *Custis v. United States*, 511 U.S. 485 (1994). While the central holding of *Custis* was that a defendant cannot raise most constitutional challenges to a prior conviction in the sentencing hearing for a new offense, the Court recognized that *Maleng* allows such challenges in federal habeas. *See Custis*, 496 U.S. at 497. The dissenting opinion noted that the Court had left undisturbed "uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." *Id.* at 512 (Souter, J., dissenting).

The Ninth Circuit recognized the *Custis* opinion's reaffirmation of *Maleng* in *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994). In *Brock*, a defendant challenged his confinement under a sexual predator statute because it was based on a prior conviction which he claimed was constitutionally invalid. The court discussed *Maleng*, *Feldman*, and *Custis* and recognized that a defendant could make "an attack on [a prior conviction] *in the context of* an

attack on [a new commitment]," and raise "a challenge to the pending sentence *as enhanced by* the allegedly invalid expired conviction." *Brock*, 31 F.3d at 890 (emphasis in original). The Court recognized that *Custis* had reaffirmed *Maleng* and left *Feldman* controlling. *See Brock*, 31 F.3d at 890, 891.[2]

This Court must therefore consider the constitutional validity of Mr. Daniels' prior robbery convictions. If those convictions are constitutionally invalid, the enhancement of Mr. Daniels' sentence is constitutionally invalid.

B. BOTH OF MR. DANIELS' PRIOR ROBBERY CONVICTIONS ARE CONSTITUTIONALLY INVALID.

1. Because He Did Not Understand The Nature Of The Offense, Mr. Daniels' Guilty Plea In The 1978 Robbery Case Was Not Intelligent And Voluntary And His Conviction Violated The Due Process Clause.

Mr. Daniels was charged in the 1978 robbery case with two other co-defendants. *See* Exhibit A (information). His role was quite limited, however, as indicated by

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[2] The Ninth Circuit did preclude a challenge to a prior conviction which had been used to enhance an Armed Career Criminal Act sentence in *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995). *See id*, at 808-09. While Clawson was appealing the denial of habeas relief under 28 U.S.C. § 2255, neither he nor the court of appeals considered the fact that he was proceeding under § 2255 instead of at an original sentencing hearing. Apparently for that eason, the court ignored both *Brock* and *Custis*'s reaffirmation of *Maleng*. The court did not consider whether a challenge to the constitutional validity of a prior conviction should be treated differently in the context of a § 2255 motion.

the characterization of his conduct at the time he was sentenced.[3] His attorney noted that on the day of trial "the People offered Mr. Daniels immunity because of his minimal involvement" and that that involvement "basically was being in the vehicle at the time the other two co-defendants went up to the telephone booth and robbed the victim." Exhibit B, at 3. The attorney also noted that "[l]iability was somewhat questionable," a claim with which the court appeared to express agreement and with which the prosecutor did not disagree. Exhibit B, at 4.

Mr. Daniels did not understand what was necessary to establish his liability. Mr. Daniels knew that the state would have to prove that he knew about the crime ahead of time and that he was in the car with the other men before they committed the robbery. He did not know then – and does not know today – what, if anything, else the state might have to prove. *See* Declaration of Earthy D. Daniels, par. 5. The main thing Mr. Daniels recalls his attorney talking to him about is the state's willingness to give him immunity if he cooperated against his co-defendants. *See id.*, par 6.

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[3] Defense counsel has not been able to locate a copy of the transcript of the guilty plea; it appears to be missing from the state court file.

a. Mr. Daniels' limited understanding of what the state must prove to convict him of aiding and abetting the robbery fell short of the proof California state law requires.

While the information did not describe Mr. Daniels as an aider and abettor, this was clearly the only possible theory under which he could have been convicted. Under California law, the information need not contain an express aiding and abetting allegation. Mr. Daniels thus could and must have been prosecuted as an aider and abettor. *See* Cal. Penal Code §§ 31, 971. *See also People v. Beeman*, 35 Cal. 3d 547, 554, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("those persons who at common law would have been termed accessories before the fact and principals in the second degree as well as those who actually perpetrate the offense, are to be prosecuted, tried and punished as principals in California").

As under federal law, moreover, mere presence is insufficient to convict a defendant as an aider and abettor. *People v. Durham*, 70 Cal. 2d 171, 181, 74 Cal. Rptr. 262, 449 P.2d 198 (1969). *See also People v. Rodriguez*, 42 Cal. 3d 730, 760-61, 230 Cal. Rptr. 667, 726 P.2d 113 (1986). Rather, the state must prove three elements – that the defendant "acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Beeman*, 35 Cal. 3d at 561.

Mr. Daniels was unaware of the second and third elements. As indicated in his declaration, he knew that the state must prove knowledge and presence but had no idea what else the state must prove. In particular, he did not know that the state had to prove intent in addition to knowledge and what, if any, affirmative act or "advice" it must prove.

Mr. Daniels thus understood neither the requisite mens rea *nor* the need for some affirmative act or advice. He entered his plea without understanding the nature of the offense to which he was pleading guilty.

b. Mr. Daniels' lack of understanding of the nature of the offense made his guilty plea invalid under the Due Process Clause.

A conviction based on a guilty plea which is not intelligent and voluntary violates the Due Process Clause. *See Brady v. United States*, 397 U.S. 742, 748 (1970) *and cases cited therein*. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court for the first time expounded upon what this meant. The Court held that the record of a guilty plea must reflect that the defendant was aware of and voluntarily waived three rights – his privilege against self-incrimination, his right to a trial by jury, and his right to confront witnesses. *See id.* at 243. In addition, the Court held, the record must reflect that the defendant had "a full understanding of what the plea connotes and of its consequences." *Id.* at 244.

One critical aspect of an intelligent and voluntary plea is an "understanding of the essential elements of the

crime charged." *Sober v. Crist*, 644 F.2d 807, 809 (9th Cir. 1981) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). *See also Henderson v. Morgan*, 426 U.S. 637, 647 & n.18 (1976); *Boykin v. Alabama*, 395 U.S. at 243 n.5. When a defendant is not aware of a critical element of the offense, his plea and the related waivers of constitutional rights cannot be intelligent and voluntary because he does not know what the government must prove or what he is admitting.

In *Henderson v. Morgan, supra*, the defendant had precisely such a partial lack of understanding. He admitted that he had killed the victim and so apparently understood that killing was one element of the offense, but he did not understand the additional critical element of intent. *See Henderson*, 426 U.S. at 642-43, 647. *See id.* at 647. For that reason, the Court found, his plea was not intelligent and voluntary.

Mr. Daniels had the same lack of understanding here and more. Like the defendant in *Henderson*, he did not understand the intent which the state would have to prove. Indeed, Mr. Daniels did not even understand what *act* the state would have to prove.

Mr. Daniels' lack of understanding arises in an even more troubling context, moreover. This was a case in which the state had already offered outright dismissal if Mr. Daniels would cooperate by testifying against his codefendants. Apparently everyone involved – the defense attorney, the court, and the prosecutor – recognized the case was weak to start with. This contrasts with the situation in *Henderson v. Morgan, supra*, where the Supreme Court recognized:

> The lawyers were certainly familiar with the intent requirement and evidently were satisfied that the objective evidence available to the prosecutor was sufficiently strong that the requisite intent could be proved beyond a reasonable doubt; accordingly, had this precise issue been discussed with respondent, his lawyers no doubt would have persisted in their advice to plead guilty. It follows that . . . there is no way one can be sure that [the defendant] would have refused to enter the plea following advice expressly including a discussion of the precise question. Indeed, we assume he probably would have pleaded guilty anyway. Such an assumption is, however, an insufficient predicate for a conviction of second-degree murder.

Henderson, 426 U.S. at 644 n. 12.

If such an assumption was insufficient in light of the strong evidence in *Henderson*, it must certainly be insufficient in the case at bar. Where the government's evidence is as weak as its evidence apparently was here, there is even greater reason to reject reliance upon the prior conviction as a basis for a severe enhanced sentence.

2. Mr. Daniels' 1981 Robbery Conviction Cannot Be Relied Upon Because It Was Obtained Through Violation Of Both His Right To Effective Assistance Of Counsel And The Due Process Clause.

Mr. Daniels' 1981 robbery conviction arose out of an incident which took place on September 15, 1981. At approximately 11:15 p.m., a man snatched the purse of Mary Christine Morrison and fled in a car driven by

another man. Exhibit C, at 4-6. A bystander wrote down the license plate number of the car. Exhibit C, at 6.

Investigating officers traced the license plate to a car which had been sold jointly to Mr. Daniels and another man who lived at the same address as Mr. Daniels. *See* Exhibit D. The robber was described by Ms. Morrison as being a black man between 19 and 23 years old, approximately 5'10" tall and weighing 160 pounds with a dark complexion, a medium Afro hair cut, and a dark bulky jacket. Exhibit E. Ms. Morrison gave no description of the driver. *Id.*

The investigating officers thereafter put out a bulletin requesting that the vehicle be stopped by any officers who observed it. Exhibits F, H. The officers discovered that the car had been impounded on September 13, 1981, when police in Montclair, California arrested a man named Robert Johnny Hall for driving under the influence. *See* Exhibit F. The officers were also advised that Mr. Daniels, as one of the owners, had picked the car up on September 15 sometime prior to 4:00 p.m. *See id.*

The investigating officers also conducted a further interview of the victim. *See* Exhibit G. She indicated that the driver was a black man in his early 20's who was "cleanly dressed" and had a dark complexion. *Id.* The officers showed her photos of both Mr. Daniels and Mr. Hall, and she stated that Mr. Daniels was "definitely not" the robber and said only that he "could have been" the driver. *Id.*

Six days after the robbery, the car was stopped by California Highway Patrol Officers in the San Dimas area. Exhibit H. The investigating officer was notified that the

vehicle had been stopped and that it was occupied by Mr. Daniels, Mr. Hall, and two Caucasian men. Exhibit C, at 16-17. The investigating officer then requested that Mr. Daniels and Mr. Hall be arrested. Exhibit H. Mr. Daniels was then transported to the Inglewood Police Department, where he confessed to being the driver of the getaway car. Exhibit C, at 22-23.

This confession and evidence that a robbery had been committed were all that was offered at the preliminary hearing. *See* Exhibit C. The Commissioner found probable cause and Mr. Daniels was held to answer in the Superior Court. *See id.* at 30. He later pled guilty. His attorney never advised him that he could file a motion seeking to suppress the confession as the product of an illegal arrest, and he would have asked his attorney to file such a motion if he had known it was possible. *See* Declaration of Earthy D. Daniels, par. 10.

a. Mr. Daniels, confession was subject to suppression as the fruit of an unlawful arrest because he was arrested without probable cause, in violation of the Fourth Amendment.

One must begin with the premise that mere presence at or association with a place or a vehicle involved in an offense is not sufficient to create probable cause. *See United States v. Di Re*, 323 U.S. 581, 586-87 (1948); *cf. Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("a person's mere propinquity to others individually suspected of criminal activity does not, without more, give rise to probable cause to search that person"). *See also United States v.*

Soyland, 3 F.3d 1312, 1314 (9th Cir. 1993); *People v. Shelton*, 60 Cal. 2d 740, 745, 388 P.2d 655, 36 Cal. Rptr. 433 (1964). One who merely happens to be driving a car six days after it was used in a robbery thus cannot be arrested for the robbery. *Cf. United States v. Arias*, 923 F.2d 1387, 1390 (9th Cir.), *cert. denied*, 502 U.S. 840 (1991) (fact that defendant was driving car with drugs in trunk established probable cause *when considered in conjunction with* defendant's link to other drug suspects, suspicious driving and interaction with one of other suspects, and informant's prior warning that drug transaction would be taking place).

While Mr. Daniels was the owner of the car involved in the 1981 robbery, ownership also is insufficient. The Ninth Circuit has suggested that ownership of property involved in a crime is insufficient by itself, even in the case of real property. *See United States v. Alexander*, 761 F.2d 1294, 1303 (9th Cir. 1985) (probable cause established by ownership *in conjunction with* defendant's proximity to cocaine processing shed and presence of small amount of cocaine in trailer defendant was in). Ownership is even weaker evidence in the context of a vehicle, which can easily be borrowed by others, as Mr. Daniels' vehicle was. Ownership is weaker evidence still when the vehicle is jointly owned by – and, presumably, driven by – two men who both live at the same address.

The California Court of Appeals implicitly recognized the insufficiency of ownership alone when it described ownership *and* several other factors as "circumstances short of probable cause to arrest" in *People v. Herrera*, 52 Cal. App. 3d 177, 124 Cal. Rptr. 725 (1975). *See id.* at 181. *Herrera* can be contrasted with *United States v.*

Gaines, 563 F.2d 1352 (9th Cir. 1977), where the court found probable cause to arrest the driver of a vehicle when the officers also knew that the defendant was the only man who had driven the vehicle during the prior month and he and his passenger matched the description of the two men who had committed the robbery. *See id.* at 1357-58.[4] *Herrera* can also be contrasted with *dictum* in *Kraus v. County of Pierce*, 793 F.2d 1105 (9th Cir. 1986), where the court suggested that there would have been probable cause to arrest the owner of a car and his companion when the robbery had just been committed and the car's engine was still warm. *See id.* at 1107, 1109.[5]

The question in the present case must therefore be what more exists here. The most significant additional factor is one that actually *detracts* from probable cause, *viz.*, the multiple users of the vehicle. The car was *jointly* owned by Mr. Daniels and another man who lived at the same address and thus apparently had equal access to the vehicle. The car was apparently also loaned out on occasion, as evidenced by the fact that Mr. Hall was actually driving it two days earlier when he was arrested. Mr.

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[4] The Ninth Circuit cited *Herrera* with approval in *Gaines*, albeit for its holding that the circumstances which fell short of probable cause did establish reasonable suspicion justifying an investigative detention. *See Gaines* 563 F.2d at 1357.

[5] The court in *Kraus* found a lack of probable cause on the actual facts because the car had not been definitively tied to the robbery. The court simply noted: "The officers would have had probable cause to arrest [the plaintiffs] if they had information linking them or their car to the crime scene." *Id.* at 1109. The officers in *Kraus* appeared to have arrived within minutes of the robbery, however. *See id.* at 1107.

Daniels was therefore just one of several individuals who drove the car. *Compare United States v. Gaines*, 563 F.2d at 1358 (defendant indicated that he and a woman were the only people who had driven the car during the preceding month).

On the other side of the coin, there was only weak evidence pointing to Mr. Daniels as a suspect. Mr. Daniels was not found with the car minutes after the robbery as in *Kraus* but *six days* later. While Mr. Daniels had picked up the car from impound the afternoon before the robbery, this was at least seven – and possibly more – hours before the robbery took place at 11:15 p.m. There was plenty of time for the other owner or some borrower – such as Mr. Hall – to take the car, with or without Mr. Daniels' permission.

There was also no description – at least of any significance – to match against Mr. Daniels. When initially interviewed by the police, the victim was able to give no description at all of the driver. *See* Exhibit E. In a later interview, the victim said the driver was dark complexioned, *see* Exhibit G, which Mr. Daniels is not. The description the victim gave at the preliminary hearing was about as general as a description can get – one man was perhaps described as shorter than the other. *See* Exhibit C, at 21. The, [sic] and when she later gave a description, she described him as While the victim did fail to exclude Mr. Daniels when shown his photograph, she also did not identify him and later testified at the preliminary hearing that she had not gotten a good enough look at the man to make an identification. Exhibit B, at 6. In sum, Mr. Daniels was only one of probably

thousands of men in the Los (Angeles area who fit the description given by the victim.

These facts are insufficient to establish probable cause when ownership of the car is joint and it is known that the car is on occasion loaned out to others. The arrest of Mr. Daniels was therefore unlawful, and his confession was subject to suppression as a fruit of this unlawful arrest, *see Taylor v. Alabama*, 457 U.S. 687, 691-92 (1982); *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975).

b. Mr. Daniels' attorney's failure to move to suppress the unconstitutionally obtained confession violated Mr. Daniels' right to effective assistance of counsel.

A direct Fourth Amendment challenge to a prior conviction cannot be made via a petition for writ of habeas corpus. *See Stone v. Powell*, 428 U.S. 465, 494-95 (1976). Failure to file a meritorious suppress motion in the absence of a reasonable strategic or tactical reason constitutes ineffective assistance of counsel which can be fully litigated in the habeas corpus context, however. *See Kimmelman v. Morrison*, 477 U.S. 635 (1986). The test to be applied is a two-pronged one – whether the failure to file a suppression motion "was unreasonable under prevailing professional norms and . . . not sound strategy" and whether the defendant was prejudiced by the failure to file the motion. *Id.* at 382 (*citing Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)).

The prejudice here is clear. The only evidence against Mr. Daniels was his confession, which followed the arrest so closely that it was clearly subject to suppression as a

fruit of the arrest if the arrest was found to be unlawful. Without that evidence, there would not even have been probable cause to hold Mr. Daniels to answer in Superior Court, let alone evidence sufficient to convict him at trial or convince him to plead guilty.

The failure to file the motion fell well below the reasonable standard of care, moreover. Most cases applying the test for ineffective assistance of counsel recognized by the Supreme Court in *Kimmelman v. Morrison*, *supra*, have focused on the merits of the Fourth Amendment claim. *See, e.g., Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1379 (9th Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.), *cert. denied*, 513 U.S. 1001 (1994); *Toomey v. Bunnell*, 898 F.2d 741, 744 (9th Cir. 1990). *But cf. United States v. Ouintero* [sic]-*Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995) (noting defense counsel's "oversight" and "uninformed judgment call" were not outside "the 'wide range of professionally competent assistance' " where district court "could have readily concluded" that stop was not pretextual). The Ninth Circuit has indicated that counsel generally should file a dispositive suppression motion if the motion is meritorious.

> This is not to say that a motion to suppress may be lightly dispensed with. Few things can more greatly benefit a criminal defendant than keeping the most probative evidence against him from being seen by the jury.

Lowry v. Lewis, 21 F.3d at 346. *See also United States v. Matos*, 905 F.2d 30, 33 (2d Cir. 1990). While it cannot always be said that "a defendant has 'everything to gain and nothing to lose' in filing a motion to suppress,"

Lowry, 21 F.3d at 346 (*quoting United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991)), it will be true in many, if not most, cases.

Mr. Daniels in particular had "everything to gain and nothing to lose." With suppression of the statement, the state would have had absolutely no case; without suppression of the statement, it had a damning case. And defense counsel here had a case – *People v. Herrera*, *supra* – in which the California Court of Appeals had expressly stated that ownership of a vehicle, *combined with other factors*, was "circumstances short of probable cause to arrest," *Herrera*, 52 Cal. App. 3d at 181.

Defense counsel should have filed the suppression motion, or at the very least advised Mr. Daniels of that option. Defense counsel's failure to do this constituted ineffective assistance, and Mr. Daniels' 1981 robbery conviction is constitutionally invalid for that reason.[6]

c. Mr. Daniels' lack of awareness of what the state had to prove to convict him on an aiding and abetting theory made his guilty plea invalid under the Due Process Clause.

As noted *supra* p. 9, a guilty plea is not intelligent and voluntary and violates the Due Process Clause if it is

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[6] Different counsel represented Mr. Daniels at the preliminary hearing, and, while suppression motions can be made under California law at that stage of the proceedings, there are legitimate tactical reasons for waiting. *See* M. Krause, *California Search and Seizure Practice* § 2.15 (CEB 1977). Only counsel in the Superior Court could be said to be ineffective, therefore.

entered by a defendant who is not aware of the nature of the offense, *i.e.*, the critical elements which the state must prove in order to convict him. As noted *supra* p. 8, Mr. Daniels does not know what is required in addition to prior knowledge and presence or association to prove guilt of aiding and abetting.

This makes the 1981 robbery conviction invalid for the same reasons that the 1978 robbery conviction is invalid, while the evidence was stronger in the 1981 case – if constitutionally obtained – the Supreme Court's analysis in *Henderson v. Morgan*, *supra*, makes this largely irrelevant. It does not matter if a defendant probably would have pled guilty anyway.

III.

CONCLUSION

Mr. Daniels' 1978 robbery conviction is constitutionally invalid because it was based on a guilty plea which was not intelligent and voluntary. Mr. Daniels' 1981 robbery conviction is constitutionally invalid because it also was based on a guilty plea which was not intelligent and voluntary and was the product of ineffective assistance of counsel – in the form of failing to file a dispositive suppression motion.

Because an Armed Career Criminal Act sentence could not have been imposed in the absence of Mr. Daniels, two robbery convictions, and because a sentence is constitutionally invalid to the extent is based on constitutionally invalid prior convictions, the sentence imposed

must be vacated. Mr. Daniels should be resentenced without the enhancement under the Armed Career Criminal Act.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: January 9, 1998 By /s/ Sylvia Torres-Guillen

SYLVIA TORRES-GUILLEN
Deputy Federal Public Defender

DECLARATION OF EARTHY D. Daniels

I, EARTHY D. Daniels, hereby declare and state:

1. I am the defendant in the above-entitled action.

2. I remember my 1978 robbery conviction. I was charged in that case with two other defendants – Maurice Timothy Smith and Richard Simes. I do not believe the prosecutor ever claimed that I actually participated in the robbery. I was arrested because I was in the car that Mr. Smith and Mr. Simes ran to when they tried to escape.

3. The prosecutor tried to get me to cooperate by testifying against Mr. Smith and Mr. Simes. He even offered me immunity for testifying. I did not want to testify against them, however, because Mr. Smith is my cousin and Mr. Simes was a friend.

4. Because I would not testify, the prosecutor would not give me immunity. I then pled guilty to the robbery charge. I knew a person could be convicted of robbery for just helping. In order to convict me this way, I thought the prosecutor would have to prove that I knew about the robbery beforehand and that I was in the car with Mr. Smith and Mr. Simes. I did not know the prosecutor would have to prove I actually helped or encouraged the robbery, and I did not know if the prosecutor would have to prove anything else.

5. The main thing I remember about my attorney in the 1978 robbery case is that he kept trying to talk me into agreeing to testify so that I could get immunity. As I say above, I would not agree to do that. My attorney never explained to me what the government would have to prove to convict me of helping with the robbery. If I had known the prosecutor would have to prove I actually helped or encouraged the robbery, I would not have pled guilty.

6. I also remember my robbery case in 1981. I was arrested about six days after the robbery while driving on the freeway near San Dimas.

7. I was driving the car. My passengers were a friend named Robert Hall and two white men whose names I now forget. My back tire blew out, and I pulled over to the side of the road. I got out of the car to check the tire, and a car pulled up behind me. A plainclothes officer then got out of the car and pointed his gun at me. He said something about two white guys having escaped from prison and had the other three men also get out of the car.

8. The California Highway Patrol then came up. I believe this was because the other officer called them. A Highway Patrol officer asked for my name and the names of my passengers. He called on the radio and apparently found out my car had been involved in the robbery, which had taken place about a week earlier. The Highway Patrol officers then arrested me and Mr. Hall and let the other men go. When I was turned over to the Inglewood Police Department, a detective interviewed me, and I confessed to being involved in the robbery.

9. I remember going to court for a preliminary hearing and being bound over to the Superior Court for a trial. I ended up pleading guilty because my attorney in the Superior Court advised me that that was the best thing to do. He never advised me that he could file a suppression motion challenging my arrest as illegal. If he had told me that he could file such a motion, I would have asked him to.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: January ___, 1998

_____
EARTHY D. DANIELS
Defendant

DECLARATION OF EARTHY D. DANIELS

I, EARTHY D. DANIELS, hereby declare and state:

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3. I do not believe the prosecutor ever claimed that I actually participated in the robbery. I was arrested because I was in the car that Mr. Smith and Mr. Simes ran to when they tried to escape.

4. The prosecutor tried to get me to cooperate by testifying against Mr. Smith and Mr. Simes. He even offered me immunity for testifying. I did not want to testify against them, however, because Mr. Smith was a friend and Mr. Simes was my brother-in-law.

5. Because I would not testify, the prosecutor would not give me immunity. I then pled guilty to the robbery charge. I knew a person could be convicted of robbery for just helping. In order to convict me this way, I thought the prosecutor would have to prove that I knew about the robbery beforehand and that I was in the car with Mr. Smith and Mr. Simes. I did not know the prosecutor would have to prove I actually helped or encouraged the robbery, and I did not know if the prosecutor would have to prove anything else.

6. The main thing I remember about my attorney in the 1978 robbery case is that he kept trying to talk me into agreeing to testify so that I could get immunity. As I say above, I would not agree to do that. My attorney never explained to me what the government would have to

prove to convict me of helping with the robbery. If I had known the prosecutor would have to prove I actually helped or encouraged the robbery, I would not have pled guilty.

7. I also remember my robbery case in 1981. I was arrested about six days after the robbery while driving on the freeway near San Dimas.

8. I was driving the car. My passengers were a friend named Robert Hall and two white men whose names I now forget. My back tire blew out, and I pulled over to the side of the road. I got out of the car to check the tire, and a car pulled up behind me. A plainclothes officer then got out of the car and pointed his gun at me. He said something about two white guys having escaped from prison and had the other three men also get out of the car.

9. The California Highway Patrol then came up. I believe this was because the other officer called them. A Highway Patrol officer asked for my name and the names of my passengers. He called on the radio and apparently found out my car had been involved in the robbery, which had taken place about a week earlier. The Highway Patrol officers then arrested me and Mr. Hall and let the other men go. When I was turned over to the Inglewood Police Department, a detective interviewed me, and I confessed to being involved in the robbery.

10. I remember going to court for a preliminary hearing and being bound over to the Superior Court for a trial. I ended up pleading guilty because my attorney in the Superior Court advised me that that way [sic] the best thing to do. He never advised me that he could file a

suppression motion challenging my arrest as illegal. If he had told me that he could file such a motion, I would have asked him to.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: December 9, 1997 /s/ Earthy Daniels
EARTHY D.
DANIELS
Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. EARTHY D. DANIELS, Defendant.	)	CV 98-0420-WMB CR 93-1042-WMB ORDER DENYING 28 U.S.C. § 2255 PETITION (Filed Nov. 12, 1998)

I. BACKGROUND

On April 20, 1994, a jury convicted Earthy D. Daniels ("Daniels") on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Because Daniels had prior convictions in state court for robbery in 1978 and 1981 and for first-degree burglary in 1978 and 1979, Daniels met the career criminal definition of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). The Court sentenced Daniels under the enhancement statute to 176 months imprisonment, to be followed by a five-year term of supervised release, and a special assessment of $50.00.

Daniels appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that his prosecution under the enhancement statute violated the Double Jeopardy Clause and that his two prior burglary convictions did not constitute "violent felonies" under

the ACCA. The Ninth Circuit affirmed Daniels' conviction and sentence in an unpublished memorandum disposition. *United States v. Daniels*, No. 95-50044, 1996 WL 292231 (9th Cir. June 3, 1996).

Daniels then filed this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Daniels challenges his sentence on the ground that his two prior state robbery convictions, which were necessary to the imposition of an enhanced sentence under the ACCA, were unconstitutional. Daniels contends that his 1978 robbery conviction was unconstitutional because his guilty plea was not voluntarily given. Daniels contends that his 1981 robbery conviction was unconstitutional because his guilty plea was not voluntarily given and because his counsel was ineffective for failing to move for suppression of certain evidence.

II. DISCUSSION

The central question in this case is whether a federal prisoner can employ a 28 U.S.C. § 2255 motion to collaterally attack the constitutionality of an expired state conviction that was used to enhance his federal sentence. Consideration of this question must begin with *Maleng v. Cook*, 490 U.S. 488 (1989), in which the Supreme Court held that a defendant cannot launch a direct habeas challenge to an expired conviction, for which he is no longer "in custody," even when that conviction is later used for enhancement purposes. *Id.* at 492. Although the Court foreclosed direct habeas attacks on expired convictions, the Court expressly reserved the question of "the extent to which [an enhancing] conviction itself may be subject

to challenge in [a habeas] attack upon the . . . sentence which it was used to enhance." 490 U.S. at 494.

The Ninth Circuit faced this question in *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990). In 1976, Feldman had pled guilty in California state court to attempted extortion, burglary, and false imprisonment. Eight years later, a federal jury convicted Feldman of unarmed bank robbery, and the Court enhanced his sentence because of the prior conviction. Feldman filed a petition for habeas corpus under 28 U.S.C. § 2254, claiming that his expired state conviction was unconstitutional because it was based on a guilty plea that he was incompetent to enter. Because the court was, under *Maleng*, without jurisdiction to consider a direct attack on Feldman's 1976 conviction, the court construed Feldman's petition as an attack on his current federal sentence as enhanced by the allegedly unconstitutional state conviction. *Id.* at 1448-49.

The court did not acknowledge that this construction of Feldman's claim brought it face-to-face with the question left unanswered in *Maleng*. Rather, the court read *Maleng* to itself guarantee the ability to collaterally attack a prior conviction through a habeas challenge to a sentence enhanced thereby. Having construed Feldman's challenge to his expired state conviction as an attack on his enhanced federal sentence, the court simply stated that the district court should "consider and resolve Feldman's claim that the challenged conviction was improper." *Id.* at 1449.

Feldman appeared short-lived in light of the Supreme Court's decision four years later in *Custis v. United States*, 511 U.S. 485 (1994). In *Custis*, a federal defendant being

sentenced under the ACCA sought to attack the constitutionality of a prior state conviction that would result in a higher federal sentence. After determining that the ACCA did not itself authorize defendants to challenge the constitutionality of prior convictions used for enhancement purposes, the Court flatly rejected Custis' argument that such challenges were guaranteed by the Due Process Clause. Except where a defendant claims that a prior conviction was obtained in violation of the Sixth Amendment right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court found that collateral attacks on expired convictions were not authorized.

The Court offered three rationales for its holding in *Custis*. First, *Gideon* violations represent a unique constitutional defect which deprives a court of "jurisdiction," under a somewhat expansive reading of the term, while other alleged constitutional violations do not "rise[] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Custis*, 511 U.S. at 496. Second, a rule allowing collateral attacks based only on alleged *Gideon* violations would prove easy to administer, as the "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order." *Id.* Finally, and perhaps most importantly, the interest in promoting the finality of judgments weighed against recognizing a due process right to collaterally attack prior convictions simply because they are later used for enhancement purposes. *Id.* at 497. This interest was especially strong where, as in the present case, the prior conviction arose from a guilty plea. *Id.*

While *Custis* seemed to implicitly overrule *Feldman*, *Custis*, unlike *Feldman*, did not arise in the habeas context. Rather, Custis sought to challenge his prior conviction in the actual sentencing proceedings. Still, nothing in the Court's language limited its holding to collateral challenges brought at sentencing rather than on habeas. Indeed, the Court stated in rather general terms: "Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. We decline to do so." *Id.* at 496. And, as the Northern District of Illinois recognized in *Bernal v. Helman*, 958 F. Supp. 349 (N.D. Ill. 1997), the most reasonable interpretation of *Custis* is that its holding extends to the habeas context.

> It would make no sense to say that a federal court – and, by implication, a state court does violate the defendant's constitutional rights by using a defective conviction to enhance his sentence, but the defendant may only seek relief from this violation in a collateral proceeding to be commenced after the sentence has been imposed and in which he has no right to counsel. . . . The reasonable implication of *Custis* is that although the taint on the enhancing conviction is not excused, it is not fundamentally unfair to presume the prior conviction valid and put the burden on the defendant to have it expunged, and if it has not been expunged at the time of the subsequent sentencing it is not fundamentally unfair – or unconstitutional – to count it against the defendant.

Id., 958 F. Supp. at 355-56 (citation omitted).

Nonetheless, the Ninth Circuit has, on at least one occasion, read *Custis* as having presented no more than a "forum question." In *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994), the Ninth Circuit not only reaffirmed its *Feldman* holding but found that holding strengthened by the Supreme Court's intervening decision in *Custis*. Brock was a state prisoner who sought to challenge the constitutionality of a 1974 assault conviction later relied upon in state proceedings to civilly commit him in 1991 as a "sexually violent predator." Although Brock was no longer "in custody" under the prior conviction, the Court read *Custis* as supporting the availability of habeas relief, particularly where the very fact of incarceration for any period of time hinged on the prior conviction. "The Court's constitutional holding [in *Custis*] was . . . clearly premised on the fact that collateral attacks [on earlier convictions] may be heard on habeas review." *Id.* at 890.

This "forum" interpretation of *Custis* appears to rest largely on the *Brock* Court's reading of the last paragraph of that decision:

> We therefore hold that § 924(e) does not permit Custis to use the federal sentencing forum to gain review of his state conviction. Congress did not prescribe and the Constitution does not require such delay and protraction of the federal sentencing process. We recognize, however, as did the Court of Appeals, that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. *See Maleng v. Cook*. If Custis is successful in attacking these state sentences, he

> may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

511 U.S. at 497 (citations omitted) (emphasis added). The highlighted language does not suggest that a defendant can attack an enhancing conviction through a habeas challenge to his enhanced sentence. Rather, the Court was simply repeating the familiar rule that a defendant *who remains in custody* under a prior conviction, i.e., a defendant whose prior conviction has not yet expired, can launch a direct habeas attack on that conviction. Far from sanctioning collateral attacks on expired convictions, *Custis* suggests that the ability to challenge a conviction on non-*Gideon* grounds expires along with the conviction itself.[1]

More consistent with the language and logic of *Custis*, and more factually similar to the present case, is *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) (per curiam). In that case, the Ninth Circuit precluded a habeas petitioner from launching a collateral challenge to an enhancing conviction on non-*Gideon* grounds. The court took *Custis* at its word: "Following *Custis*, there is

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[1] Of course, the fact that Custis was still "in custody" under his state conviction, and that he could therefore attack that conviction through a direct habeas challenge, lessened the implications of disallowing such a challenge in a habeas attack on the enhanced sentence. Nonetheless, *Custis* contains no indication that the requirements of due process are any greater where the prior conviction has expired and is no longer subject to a direct habeas challenge.

no constitutional right to collaterally challenge the constitutionality of a prior conviction for any reason other than deprivation of the *Gideon* right to counsel." *Id.* at 809; *see also Entendencia v. Grabtree*, 980 F. Supp. 1172, 1175-76 (D. Haw. 1997). *Clawson* did not draw any distinction between collateral challenges made at sentencing and those brought by way of a habeas attack on an enhanced sentence. And, although *Clawson* never mentioned *Feldman* by name, the clear implication was that *Feldman* no longer remained good law.[2]

That *Clawson* should govern the Court's disposition of the present motion is especially clear following the Ninth Circuit's decision in *Contreras v. Schiltgen*, 151 F.3d 906 (9th Cir. 1998). In that case, Contreras sought to challenge, by a 28 U.S.C. § 2241 habeas petition, the constitutionality of an expired state conviction upon which his INS custody and eventual deportation were predicated. The Court read *Clawson* "to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner

---

[2] At least two district courts have read *Clawson* as expressing no view on the right of a federal defendant to attack the constitutionality of a prior state conviction through a § 2255 challenge to a federal sentence enhanced thereby. *See Sanders v. United States*, 8 F. Supp. 2d 674, 678-79 (N.D. Ohio. 1998); *Bernal*, 958 F. Supp. at 357. This is not a proper reading of *Clawson*. *Clawson* was a § 2255 habeas case, not a direct appeal from a federal conviction and sentence, and Clawson's § 2255 motion attacked both the use of a non-final state conviction for enhancement purposes *and* the constitutionality of the state conviction itself. The second part of the *Clawson* opinion plainly bars collateral challenges to an expired conviction on habeas.

raises a *Gideon* claim," *id.* at 907, and affirmed the dismissal of Contreras' habeas petition. The court noted more generally: "When the federal proceeding its governed bar statutes [like the ACCA] that limit inquiry to the fact of conviction, there can be no collateral review of the validity of the underlying conviction except for *Gideon* claims." *Id.* at 908.[3]

Daniels' does not allege that his California convictions were obtained in violation of his *Gideon* right to counsel. Under *Custis*, as interpreted in *Clawson* and *Contreras*, Daniels is precluded from collaterally attacking his state robbery convictions on anything other than *Gideon* grounds. Accordingly, Daniels' enhanced federal sentence is constitutionally valid, and his motion to vacate, set aside, or correct that sentence must fail.

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[3] The *Contreras* Court noted that its decision "does not necessarily bear on the validity of our holding in [*Brock*], in which we permitted collateral review of an expired state conviction in a § 2254 habeas challenge to state civil confinement predicated thereon." 151 F.3d at 908. Because the present case involves a *federal* sentence enhanced by allegedly unconstitutional state convictions, *Clawson*, and not *Brock*, controls.

III. CONCLUSION

For the foregoing reasons, Daniels' 28 U.S.C. § 2255 motion is DENIED.

Date: Nov. 10, 1998

/s/ Wm. Matthew Byrne
Wm. Matthew Byrne, Jr.
United States District Judge

Supreme Court of the United States

No. 99-9136

Earthy D. Daniels, Jr.,

Petitioner

v.

United States

ON CONSIDERATION of the motion of petitioner for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

September 8, 2000

GRANTED

(5)

Supreme Court, U.S.
FILED
OCT 19 2000
CLERK

No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PETITIONER

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36 pp

QUESTION PRESENTED

Whether a defendant may use 28 U.S.C. § 2255 to challenge his sentence based on a claim that the expired state convictions used to enhance his sentence under the ACCA are constitutionally invalid?

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JURISDICTION

The Ninth Circuit entered its judgment on October 21, 1999; the order denying the petition for rehearing was issued on January 13, 2000. Pet. App. 5. The petition for writ of certiorari was filed on April 12, 2000 and was granted on September 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act of 1984 (ACCA) codified in relevant part at 18 U.S.C. § 924(e)(1) and the relevant portions of 28 U.S.C. § 2255 are reproduced in the Appendix.

STATEMENT OF THE CASE

In December 1993, petitioner Daniels was indicted in the United States District Court for the Central District of California for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). JA 2. The government filed a notice of its intention to seek an enhanced penalty

under the ACCA based on three prior convictions suffered by Daniels in the state of California: a 1978 conviction for robbery, a 1979 conviction for first degree burglary, and a 1981 conviction for robbery. JA 4-5. The ACCA requires a fifteen-year mandatory minimum sentence for any person who is convicted of violating 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. Daniels was convicted following a trial.

Absent application of the ACCA, petitioner's guideline range would have been 84 to 105 months. The district court, however, found that because petitioner had four violent convictions,[1] the ACCA applied, and the applicable guideline range was 188 to 235 months. The court sentenced petitioner to a term of 176 months following a downward departure of 12 months because petitioner had served 12 months in state custody for the identical offense. JA 12-18.

Following affirmance of the sentence on appeal, petitioner filed a motion under 28 U.S.C. § 2255 challenging the 176-month sentence. The motion alleged that two of the four predicate California prior convictions used to enhance his federal sentence had been obtained in violation of the United States Constitution. JA 20-57.

He specifically alleged that the 1978 robbery conviction was invalid because his guilty plea to that offense was not intelligent and voluntary. *Boykin v. Alabama*, 395

[1] In addition to the three predicate felony convictions noticed by the government, the court found that petitioner had been convicted of burglary in 1979.

U.S. 238 (1969). As the only basis for his liability was as an aider and abettor and he had not been advised that he needed to intend the robbery and must have done some affirmative act in furtherance of it, his consequent guilty plea violated due process. JA 37-42.

He challenged his 1981 robbery conviction on that same basis. Additionally, he alleged that the conviction was unconstitutional because he had not received the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, counsel failed to file a potentially meritorious motion to suppress a statement made by petitioner following an arrest that was arguably without probable cause. JA 42-51.

The district court declined to reach the merits of petitioner's claims. Instead, it found that *Custis v. United States*, 511 U.S. 485 (1994) precluded petitioner from collaterally attacking his state robbery convictions on any ground other than that his conviction had been obtained in violation of his right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). Because petitioner had not alleged a *Gideon* violation, the district court denied the motion. JA 58-67.

Petitioner appealed, and the Ninth Circuit Court of Appeals affirmed the district court's denial. The Ninth Circuit read *Custis* to preclude virtually all collateral challenges to prior convictions: "In a § 2255 proceeding, *Custis* bars 'federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim.' " Pet. App. 4 (citation omitted).

SUMMARY OF ARGUMENT

The district court doubled petitioner's firearm possession sentence because there are four California felony convictions on his record. Two of those convictions may have resulted from violations of the Fifth and Sixth Amendments, negating the constitutionality of the resulting federal sentence. Yet, the Ninth Circuit, relying on *Custis*, held that the federal courts are closed to petitioner's claim. That is wrong. A motion under 28 U.S.C. § 2255 to vacate a sentence imposed in violation of the Constitution provides both an appropriate and necessary vehicle for litigating petitioner's claim.

The Court's decisions in *Townsend v. Burke*, 334 U.S. 736 (1948), *Burgett v. Texas*, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972) establish that a sentence based on prior convictions that are materially false violates due process. Although the constitutional defect in those cases stemmed from the lack of counsel, the same principle applies where another constitutional violation renders the conviction "materially untrue." *Townsend*, 334 U.S. at 741. And on collateral review, many courts have vacated sentences that were enhanced by unconstitutional convictions.

Custis did not abrogate this principle. Instead, it extended the right to collaterally challenge unconstitutional prior convictions to the sentencing hearing – if the challenge was based on the denial of counsel. It did not, however, foreclose other constitutional challenges in traditional collateral proceedings, such as habeas corpus. Indeed, *Custis* explicitly noted that alternative forums

were available for constitutional challenges on other than *Gideon* grounds. *Custis*, 511 U.S. at 497.

A motion under section 2255 remains a proper forum for bringing those challenges, particularly where it is the only forum to do so. Where there is no other forum, closing off a section 2255 proceeding virtually ensures that many federal sentences will rest on an unconstitutional foundation. No reason exists for that. Many of the considerations that prompted the *Custis* court to open the sentencing hearing only to *Gideon* challenges are either not present or not as weighty in this context.

First, federal habeas courts are well-qualified to resolve fact-based constitutional challenges, having historically done so in both federal habeas corpus proceedings under 28 U.S.C. §§ 2254 and 2255. Second, unlike the defendant in *Custis*, petitioner's prior convictions are fully expired. The state has a lesser interest in its judgment when all that is at stake is its use as a federal sentencing predicate, and the defendant has received the full measure of the state's punishment for the offense. Finally, whatever remains of the state's interest in the finality of its judgment is outweighed by the possibility (and, in some cases, the virtual certainty) that the Government will imprison persons for many years on the basis of invalid and unconstitutional prior convictions – if no other forum exists to challenge those convictions. Permitting challenges in a 2255 proceeding – where and when those convictions are of consequence – obviates that possibility. That result is both just and workable.

ARGUMENT

PETITIONER MAY CHALLENGE, THROUGH A 28 U.S.C. § 2255 MOTION, THE CONSTITUTIONALITY OF THE PRIOR CONVICTIONS USED TO AUTOMATICALLY INCREASE HIS SENTENCE UNDER THE ACCA

The district court found that Mr. Daniels had suffered four prior California convictions that qualified as predicate felonies under the ACCA. That finding required the court to double petitioner's sentence. In a motion under 28 U.S.C. § 2255 filed after his sentencing, petitioner alleged that two of the four convictions were obtained in violation of the Constitution. That claim, however, has never been adjudicated because both the district court and the Ninth Circuit Court of Appeals, relying on the Court's decision in *Custis v. United States*, 511 U.S. 485 (1994), held that petitioner could not litigate the constitutionality of the prior convictions in a section 2255 motion. This case, then, presents two issues: may an enhanced sentence be founded on an unconstitutional prior conviction and, if not, may the defendant litigate the unconstitutionality of his sentence in a section 2255 motion after sentencing.[2]

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[2] The Circuit Courts have split on the issue. Some disallow such challenges. *See Turner v. United States*, 183 F.3d 474 (6th Cir. 1999); *Ryan v. United States*, 214 F.3d 877 (7th Cir. 2000); and *United States v. Daniels*, 195 F.3d 501 (9th Cir. 1999). Others allow it. *See United States v. Clark*, 203 F.3d 358 (5th Cir. 2000); *Means v. Alabama*, 209 F.3d 1241 (11th Cir. 2000) (petitioner who challenges an expired state sentence used to enhance federal sentence must bring suit under 28 U.S.C. § 2255).

As to the first issue, before *Custis*, the virtually uniform jurisprudence of the Court and the Circuit Courts established that an unconstitutional prior conviction could not be used to support guilt or enhance a sentence. Although some courts have interpreted *Custis* to preclude all collateral challenges (except on *Gideon* grounds) to the constitutionality of prior convictions, they are wrong. *Custis* established the right to challenge prior convictions at sentencing on *Gideon* grounds but did not preclude other constitutional challenges in the appropriate forum. That being so, where the defendant has no other available remedy, a section 2255 motion filed after sentencing provides a proper and sound vehicle to litigate the constitutionality of the prior convictions.

A. The Use of an Unconstitutionally Obtained Prior Conviction to Automatically Increase the Defendant's Sentence Violates the Constitution

1. *Townsend, Burgett* and *Tucker*

In a line of cases beginning with *Townsend v. Burke*, 334 U.S. 736 (1948), the Court has held it violates due process to base a sentence on prior convictions that are materially false. In *Townsend*, the trial court sentenced the defendant, who was appearing without counsel, on the assumption that he had sustained six or seven prior larceny convictions. In fact, at least three of those offenses had not resulted in convictions. The Court vacated the sentence because the defendant, lacking counsel, "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* at 741.

Burgett v. Texas, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972) extended this principle to forbid the use of an unconstitutional prior conviction to enhance a sentence. *Burgett* involved a prosecution under the Texas recidivist statute. In support of an enhanced sentence, the state introduced a certified copy of the defendant's Tennessee conviction. The record failed to show that the defendant had been represented by counsel. That failure created a presumption that the defendant's conviction had been obtained without counsel, a violation of the Sixth and Fourteenth Amendments under *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Court held that admission of the prior conviction tainted by the *Gideon* violation constituted reversible constitutional error. *Burgett* reasoned that the admission of the prior constituted a new constitutional violation: "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or to *enhance punishment for another offense* [citation omitted] is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115 (emphasis added).

The Court reaffirmed this principle – that an unconstitutional prior cannot serve as the predicate for an enhanced sentence – a few years later. In *Tucker*, after the defendant acknowledged at the sentencing hearing that he had sustained three prior felony convictions, the district court sentenced him to the statutory maximum term of 25 years. Several years later, a California court conclusively determined that two of the prior convictions,

from Florida and Louisiana, were constitutionally invalid on *Gideon* grounds. The defendant filed a section 2255 motion attacking his federal conviction and sentence as tainted by the invalid prior convictions.

Tucker affirmed the appellate court's reversal of the defendant's sentence. The Government argued the sentence should be upheld as the unreviewable discretionary act of the trial court. The Court rejected that argument, finding that the sentence was "founded at least in part upon misinformation of constitutional magnitude." 404 U.S. at 592. Had the judge known that two of the prior convictions were unconstitutional, he might have imposed a different sentence. For that reason, the Court remanded for a new sentencing to prevent the "erosion of the *Gideon* principle." 404 U.S. at 593.

Following *Burgett* and *Tucker*, federal courts vacated sentences enhanced by convictions tainted by *Gideon* violations.[3] More tellingly, with the exception of the Third Circuit[4], the other circuit courts relied on *Burgett* and *Tucker* as authority for vacating sentences predicated on prior convictions that were unconstitutional for reasons other than the denial of counsel.[5] This extension naturally

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[3] *See, e.g., Stepheny v. United States*, 516 F.2d 7, 8-9 (4th Cir. 1975) (en banc); *Farrow v. United States*, 580 F.2d 1339, 1344-48 (9th Cir. 1978) (en banc); *Reynolds v. United States*, 528 F.2d 461, 462 (6th Cir. 1976).

[4] The Third Circuit limited *Burgett* and *Tucker* to *Gideon* violations. *United States v. Graves*, 554 F.2d 65, 82 (3d Cir. 1977) (en banc).

[5] *See, e.g., Brown v. United States*, 610 F.2d 672 (9th Cir. 1980) (*Tucker* forbids sentence enhancement by prior convictions

flowed from *Burgett* and *Tucker* because the Court never suggested that its holdings were limited to *Gideon* violations. *Burgett* characterized *Gideon* as "illustrative of the limitations which the Constitution places on state criminal procedure" and noted that the admission of the priors was unconstitutional because it violated a "specific federal right," implying that admission of priors tainted by other specific federal rights would be equally unconstitutional. 389 U.S. at 114, 116. *Tucker* reached its result because the judge considered a prior conviction that had "been unconstitutionally obtained," again placing no limitation on the source of the violation. 404 U.S. at 448. Later, the Court in *Zant v. Stephens*, 462 U.S. 862 (1983) explained *Tucker's* holding as requiring a "sentence be set aside if the court relied at least in part on 'misinformation of constitutional magnitude' *such as* prior uncounseled convictions," suggesting a broader application. *Id.* at 887, n.23 (emphasis added).

Moreover, the rationale of both cases applies equally to other constitutional violations. *Burgett* reasoned that allowing use of the unconstitutional prior denied the right "anew." 389 U.S. at 116. That is equally true where the defendant's prior conviction was procured through another constitutional violation, whether it was an involuntary guilty plea, prosecutorial misconduct, or ineffective assistance of counsel. The defendant suffers a

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tainted by ineffective assistance of counsel); *Stead v. Link*, 540 F.2d 923 (8th Cir. 1976) (*Tucker* forbids sentence enhancement by prior convictions based on involuntary guilty pleas); *United States v. Day*, 949 F.2d 973, 981 (8th Cir. 1991) (same).

renewed violation of those rights when that conviction is used to increase the sentence for a different offense.

Tucker, citing *Townsend*, outlawed the use of an uncounseled prior because it injected misinformation into the sentencing process, a violation of due process. 404 U.S. at 447. On that score, the lack of effective counsel is often indistinguishable from the absence of counsel. The "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). And to prevail on an ineffective assistance of counsel claim, one must ordinarily show that the challenged deficiency had some "effect on the reliability of the trial process." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Thus, just like an uncounseled conviction, a conviction obtained in violation of the defendant's Sixth Amendment right to the effective assistance of counsel lacks the requisite reliability for its unquestioned use to enhance a sentence.

Indeed, the rationale behind recidivist statutes, in general, and the ACCA, in particular, fails if unconstitutional and unreliable prior convictions are used to impose a more severe sentence. "Its [recidivist statute's] primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummel v. Estelle*, 445 U.S. 263, 284 (1980) Thus, to justify sentences that are often

exponentially longer, the prior conviction must reliably indicate a person's propensity to commit crimes.[6] That necessary connection is severed where the prior conviction was unconstitutionally obtained, rendering it of questionable reliability.

Thus, before *Custis*, the almost uniform body of jurisprudence in this country prohibited an inherently unreliable, unconstitutional prior conviction to serve as the foundation for an enhanced sentence. *Custis* did not overturn this principle.

2. *Custis*

In *Custis*, the Court confronted the issue of "whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA." 511 U.S. at 487. The defendant first argued that the statute, 18 U.S.C. § 924(e), should be read to permit collateral attacks on the priors[7] before they could be used at sentencing. The Court rejected that argument. It noted that

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[6] This is particularly true of the ACCA. Congress intended the ACCA to promote public safety by incapacitating those who commit a large number of burglaries and robberies. Congress found that a "small number of repeat offenders commit a highly disproportionate amount of the violent crime." S. Rep. No. 98-190, at 5 (1983). The entire justification for the severe sentence for the relatively less serious offense of weapons possession falls if the prior convictions do not reliably indicate guilt.

[7] The defendant challenged two of his prior convictions. Both were tainted because his counsel had been ineffective. Also, his guilty plea in one had been obtained involuntarily and the other, obtained after a stipulated-facts trial, amounted to an involuntary guilty plea. *Id.* at 488.

where Congress intended to authorize collateral attacks at the time of sentencing, it did so expressly as in 18 U.S.C. § 851(c)(2). That section 924(e) lacked similar language allowed the Court to conclude that Congress did not intend to allow collateral attacks at sentencing. *Id.* at 491-93. As petitioner does not posit section 924(e) as the source of his right to challenge the constitutionality of the predicate priors, that part of *Custis* does not foreclose the argument.

The second argument asserted by the defendant in *Custis* is more germane. He argued that, irrespective of Congressional intent, the Constitution required that he be permitted to attack the validity of the convictions before their use at sentencing, citing *Burgett* and *Tucker*. The Court disagreed, distinguishing *Burgett* and *Tucker*. Both cases involved the failure to appoint counsel in violation of *Gideon*. That failure, the Court reasoned, was a "unique constitutional defect" amounting to a jurisdictional problem and thus could be raised collaterally at sentencing. Other constitutional violations, such as the ineffective assistance of counsel and an involuntary plea of guilty, did not rise to that level. *Id.* at 493-96.

The Court offered two further reasons for distinguishing *Gideon* challenges from other constitutional violations. First, administrative ease supported its holding. *Gideon* violations will generally appear on the face of the record and thus would not necessitate any effort to resolve the claim. Second, "the interest in promoting the

finality of judgments" supported restriction of collateral attacks to *Gideon* challenges. Because the "Constitution does not require such delay and protraction of the *federal sentencing process*," the Court held that the ACCA did not permit the defendant "to use the *federal sentencing forum* to gain review of his state convictions." *Id.* at 497 (emphasis added).

Custis thus extended the right to collaterally challenge prior convictions at the sentencing hearing only to alleged *Gideon* violations. But it did not approve use of unconstitutional prior convictions to impose an enhanced sentence under the ACCA, and it did not bar challenges to those convictions in forums other than the sentencing hearing: "*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity." *Nichols v. United States*, 511 U.S. 738, 765 (1994) (Ginsburg, J., dissenting). That is clear from the plain language of *Custis*.

After stating its holding, the Court noted that because the defendant was still in state custody on his predicate Maryland convictions, he could attack them in Maryland or through federal habeas review. If he succeeded, he could "apply for reopening of any federal sentence enhanced by the state sentences." And although the Court declined to express an opinion on the appropriate disposition of such an application, its recognition of its existence strongly suggested its merit. 511 U.S. at 497. *Custis's* reference to this possibility proves that the Court did not overturn the principle that unconstitutional prior convictions could not be used to increase the length of a sentence. Unless the constitutionality of prior convictions mattered, there would be no need to reopen the federal

sentencing hearing where they were vacated on grounds other than *Gideon*.

In fact, that is the same conclusion reached by every federal circuit court that has considered the issue. "Since *Custis* was decided in 1994, seven other circuits, all that have considered the issue, have also held, or indicated without expressly deciding, that pursuant to federal habeas corpus, a district court may reopen and reduce a federal sentence, once a federal defendant has, in state court, successfully attacked a prior state conviction, previously used in enhancing the federal sentence." *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (collecting cases). Both before and after *Custis*, an unconstitutional prior conviction may not be used to enhance a sentence.

B. The Appropriate Forum For Challenging the Constitutionality of a Predicate Prior That Is Fully Expired Is a Section 2255 Motion

28 U.S.C. § 2255 provides that a "prisoner in custody under the sentence of a court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Petitioner's claim is that the predicate convictions used to sentence him under the ACCA were unconstitutionally obtained. As shown above, if true, the resulting sentence is also unconstitutional, and section 2255 by its express terms lies to remedy a sentence "imposed in violation of the

Constitution" or "otherwise subject to collateral attack." In section 2254 proceedings, the courts recognize that a sentence enhanced by a prior conviction is subject to collateral attack on the ground that the prior conviction is invalid. No reason exists to differentiate section 2255 actions.

And where the prior state convictions used to increase the defendant's federal sentence are fully expired, section 2255 proceedings provide the **only** forum to remedy the unconstitutionality of the enhanced sentence. Petitioner, unlike the defendant in *Custis*, cannot attack his prior convictions in state court[8] or by federal habeas corpus in a 2254 petition. *Maleng v. Cook*, 490 U.S. 488 (1989). If a section 2255 motion is unavailable, the federal courts must necessarily countenance federal sentences that are unconstitutional, having been automatically increased by prior convictions that are unconstitutional and unreliable. *Custis* does not stand for this principle. Where no other forum exists to litigate the constitutionality of the prior convictions, society's interest in assuring that people are sentenced on a constitutional basis outweighs the state's diminished stake in finality and the courts' legitimate concern for efficiency. A section 2255 action provides a viable forum for enforcing that constitutional interest.

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[8] He cannot proceed by state habeas corpus because he is no longer in custody. Coram nobis does not lie in California to challenge errors of law or to raise ineffective assistance of counsel. *People v. Ibanez*, 90 Cal.Rptr.2d 536, 541, 542 n.13 (Cal.Ct.App. 1999).

1. Habeas Courts May Entertain Constitutional Challenges to Prior Convictions Where the Prior Conviction Is the Predicate for a Longer Sentence

Federal courts have jurisdiction under section 2255 to entertain constitutional challenges to the defendant's current sentence. That jurisdiction includes challenges to the constitutionality of any prior conviction that increased the length of the defendant's sentence. This principle, not at issue in *Custis*, follows directly from the Court's decision in *Maleng v. Cook*, 490 U.S. 488 (1989). *Maleng* sanctioned the use of habeas corpus (or in this case a section 2255 motion) to challenge the constitutionality of an expired prior conviction – on grounds other than the denial of counsel – to the extent it is used to enhance a current sentence.

Maleng involved a challenge on federal habeas to the prisoner's 1958 Washington state conviction on the ground that he had not been given a necessary competency hearing. The conviction had fully expired, but it was used to increase the mandatory minimum sentence on the defendant's subsequent 1978 Washington state conviction. The defendant relied on this fact to argue that he was still in custody on the 1958 conviction. The Court rejected that argument, finding that the habeas petitioner was no longer in custody on the 1958 conviction because it had expired. Accordingly, federal habeas did not lie to attack his 1958 conviction. 490 U.S. at 492. The Court did, however, find that he was in custody on the 1978 conviction. It therefore construed his habeas petition as "asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction," cited *Tucker* for the

propriety of such a challenge, and allowed him to proceed.[9]

Following *Maleng*, the Circuit Courts have entertained habeas challenges under 28 U.S.C. § 2254 by state prisoners to the constitutionality of expired convictions when they are used to enhance their current sentences.[10] *See, e.g., Williams v. Edwards*, 195 F.3d 95, 96 (2d Cir. 1999) (petitioner may pursue challenge to constitutionality of expired prior conviction used to enhance current sentence); *Young v. Vaughn*, 83 F.3d 72, 77-78 (3d Cir. 1996) (prisoner may attack current sentence by habeas challenge to constitutionality of expired conviction if conviction used to enhance current sentence); *Dilworth v. Johnson*, 215 F.3d 497, 500 (5th Cir. 2000); *Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994) (same); *Brock v.*

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[9] The Court expressed "no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance." *Id.* at 493. A leading treatise on federal habeas corpus notes the Court's statement pertains to the "question whether, in the process of voiding a current sentence enhanced on the basis of an unconstitutionally imposed prior conviction as to which custody has been terminated, the prior conviction 'itself' may be voided, thus depriving it of other collateral consequences in addition to its effect on the sentence currently being served." James S. Liebman & Randy Hertz, *Federal Habeas Corpus and Procedure* § 8.2c, at 333 n.20 (3d ed. 1998).

[10] On October 10, 2000, the Court granted certiorari in *Lackwanna v. Coss*, No. 99-1884. The question presented by the petition for certiorari was: Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the petitioner is presently in custody?

Weston, 31 F.3d 887, 890 (9th Cir. 1994) (same); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir. 1990) (same); *White v. Butterworth*, 70 F.3d 573, 574 (11th Cir. 1995). *Contra Charlton v. Morris*, 53 F.3d 929, 929 (8th Cir. 1995) (per curiam). And except for the Eighth Circuit, the appellate courts have entertained challenges, on habeas corpus, to the constitutionality of prior convictions on grounds other than the denial of counsel.[11] Congress enacted section 2255 to afford federal prisoners a remedy identical in scope to federal habeas corpus. *Davis v. United States*, 417 U.S. 333, 343 (1974). Section 2255, like section 2254, lies to challenge the constitutionality of predicate prior convictions.

2. Section 2255 Motions Provide a Workable and Necessary Forum to Litigate the Constitutionality of Expired Priors Used to Enhance the Federal Sentence

A section 2255 proceeding must be used in a case like petitioner's, where because the prior conviction is fully expired, its constitutionality cannot be litigated in state court. Provision of a forum by 2255 – where no alternative forum exists – ensures that the current federal sentence has a constitutional foundation. That fact and the normal work of federal habeas courts in resolving fact-

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[11] This is consistent with Justice Souter's view that *Custis* did "not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." 511 U.S. at 512 (Souter, J., dissenting).

intensive issues make a 2255 action a perfect and necessary forum for resolving challenges to the prior conviction. These considerations also distinguish this case from *Custis* and outweigh the countervailing considerations that led *Custis* to permit only *Gideon* challenges at sentencing.

a. Interest in Assuring Constitutional Sentences

In many cases, the prior state convictions will be fully expired. The defendants, having finished their terms, will not be able to challenge the validity of their convictions in state court. Unless a remedy under section 2255 is available, many people may well serve numerous extra years in federal prison without cause. This is because the prior convictions that automatically produce the extra time will be beyond all judicial scrutiny, and any constitutional defect – no matter how egregious – will not be cognizable in federal court. Thus, where the prior conviction was secured by a prosecutor who concealed exculpatory evidence and that violation under *Brady v. Maryland*, 373 U.S. 83 (1963) went undiscovered until the new federal proceeding, the tainted conviction must nonetheless be used to increase the federal sentence. Similarly, where the prior conviction was secured by the use of perjured testimony, *see, e.g. Napue v. Illinois*, 360 U.S. 264 (1959), that conviction must also form the basis of an enhanced sentence. No matter how plain the error, the defendant may not challenge it and the federal court may not correct it – unless section 2255 lies as a remedy.

Further, that the defendant did not obtain correction of the error in state court (or by federal habeas review) does not justify closing the doors to the federal court after that court has used the prior to increase a federal sentence. In some cases, the defendant will not have challenged the conviction before because he was unaware of the basis for a challenge. For example, in some cases of *Brady* error, the suppressed evidence may not have been discovered, perhaps on review by successor counsel, until after the defendant completed his term. And where the prior conviction is tainted by the ineffective assistance of counsel, that same deficit might prevent defendant from intelligently deciding whether to appeal or pursue collateral relief: "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (citation omitted).

Moreover, the defendant may have good reasons for foregoing a challenge at the time of the conviction: "the assumption that a defendant has sufficient incentive to challenge his prior conviction, beyond that inspired by its immediate consequence, seems unwarranted." *Smith*, 25 F.3d at 1368 (7th Cir. 1994). Where little or no additional time was imposed, as the result of concurrent sentences or a plea bargain, the defendant often has little reason to pursue an appeal or collateral attack, irrespective of the potential legal merit of such an attack.[12] Some claims,

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[12] For example, petitioner sustained all the predicate convictions for his ACCA enhancement by 1981 or three years

such as ineffective assistance of counsel or *Brady* errors, must be raised in a collateral proceeding instead of by direct appeal. Since there is no right to counsel on collateral review, *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987), the defendant may forebear meritorious claims, lacking the resources, knowledge and incentive to litigate them. Thus, unless a section 2255 proceeding is available, potentially invalid prior convictions will necessarily increase sentences under the ACCA. That potential, not at issue in *Custis*, makes this case different and changes the balance.

b. Administrative Ease and Burden on the Courts

Another factor that weighs differently here than in *Custis* is the burden on the courts. *Custis* posited the relative ease of resolving *Gideon* challenges, as compared to other constitutional challenges, in support of its decision. The Court noted that a *Gideon* violation would generally appear in the court's record while determination of ineffective assistance of counsel claims and involuntary guilty pleas "would require *sentencing* courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." 511 U.S. at 496 (emphasis added). In contrast to sentencing courts, habeas courts are well-situated to sort

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before the passage of the ACCA. Obviously, his decision whether to appeal or collaterally attack his conviction at that time did not account for the possibility of their subsequent use to enhance his sentence under the ACCA.

through transcripts and conduct the type of fact-intensive inquiry that might be necessary. Federal courts routinely perform that type of inquiry in reviewing 2254 claims. *See, e.g. Smith v. Farley*, 25 F.3d 1363, 1367 (7th Cir. 1994) (limiting review of prior convictions to those which are presumptively void ensures that hearing will not be transformed into a mini-trial concerning their validity when an alternative forum exists for such a fact-intensive inquiry); *United States v. Ricardo*, 78 F.3d 1411, 1415, n.7 (9th Cir. 1996) ("This is a task better suited to state courts of appeal or federal and state habeas courts."). Shifting that inquiry to a habeas proceeding makes good administrative sense and eases the concerns voiced in *Custis*.

Further, the universe of potential attacks on the prior conviction would be more limited in a section 2255 proceeding than at a sentencing hearing. Only those claims that reached constitutional dimensions would be justiciable; claims raising mere procedural irregularities could be summarily dismissed. *Hill v. United States*, 368 U.S. 424, 428 (1962) (section 2255 motion lies to correct only fundamental defects which inherently result in a complete miscarriage of justice or an omission inconsistent with rudimentary demands of fair procedure). Allowing potentially meritorious claims to be litigated in a section 2255 proceeding would not overburden the courts.

In fact, it may well lessen the overall burden. Following their convictions, many defendants forego possible state and federal habeas corpus litigation because there is often insufficient current incentive to pursue it. The litigation might last longer than the term of imprisonment, the perceived benefit might not merit the trouble, or the

low likelihood of success might discourage the undertaking. If, however, that presents the last and final opportunity to challenge a conviction that could later result in a greater term of imprisonment than the person received on the initial conviction, all prisoners would be well-advised to mount every imaginable challenge. Thus, many prisoners would likely file habeas petitions that they would have otherwise foregone.

c. Federalism and Finality

Finality, the last reason offered by *Custis* to bar collateral challenges at sentencing (511 U.S. at 597), also weighs less in a 2255 proceeding challenging the use of an expired conviction. Most of the interests promoted by finality are significantly diminished where the prior conviction is fully expired. In *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court identified a number of values associated with finality. Finality enhances the law's deterrent effect because the defendant finally knows that he will suffer punishment for his misdeeds. Further, when a habeas petitioner succeeds in obtaining a new trial, the passage of time may prejudice the state and diminish the chances of a reliable adjudication. Finally, the "reexamination of state convictions on federal habeas frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 491 (alteration in original) (citations omitted).

Where the defendant's prior conviction is fully expired, he has already received the full measure of the state's punishment for the prior offense. Unlike a challenge while still in custody, he cannot expect or even

hope that he will serve less than his full sentence. Similarly, because the sentence has expired, the state suffers no prejudice if the district court subsequently finds the prior conviction an invalid basis for an increased federal sentence. That action will not affect the state's judgment, and the state will not need to retry the defendant; it only eliminates the conviction's use to enhance a federal sentence. *See e.g., Smith v. Farley*, 25 F.3d 1363, 1368, n.10 (7th Cir. 1994) (federal court may review constitutionality of state prior used to enhance without violating full faith and credit because of the distinction between using an already-served prior conviction as evidence in imposing an enhanced sentence and enforcing that judgment). The federal court's superior interest in assuring the constitutionality of its sentences outweighs the state's interest in its judgment having the force of a federal sentencing predicate.

On balance, provision of a forum by section 2255 makes good common and constitutional sense. Ensuring the constitutionality of a prior conviction, the predicate for an increased sentence, affirms the integrity of the criminal justice system. *Cf. Elkins v. United States*, 364 U.S. 206, 222 (1960) (exclusion in federal trial of evidence illegally seized by state authorities promotes the "imperative of judicial integrity"). Federal courts, conducting section 2255 proceedings, are well-suited for resolving the issues raised by these challenges, and the state's muted interest in finality does not justify sanctioning unconstitutional sentences.

Petitioner long ago completed service of the sentences from his California convictions. Now, however, the

Government has revived those convictions to dramatically increase his current sentence for possession of a firearm. All parties retain an interest in assuring the constitutionality of those convictions. The instant section 2255 proceedings provide a perfect forum to do so. And there is no other. Under these circumstances, he must be permitted to use section 2255 to challenge his current federal sentence that may have been increased by prior convictions that are unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

RELEVANT STATUORY PROVISIONS

18 U.S.C. § 924 Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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No. 99-9136

In the Supreme Court of the United States

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant whose sentence was enhanced under a federal recidivist provision because of his prior state convictions, and whose state convictions have not been set aside by any court, may challenge his federal sentence under 28 U.S.C. 2255 based on the claim that the prior state convictions are constitutionally invalid.

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In the Supreme Court of the United States

No. 99-9136

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (App., *infra*, 1a-5a[1]) is reported at 195 F.3d 501. The opinion of the court of appeals affirming petitioner's conviction is unpublished, but the decision is noted at 86 F.3d 1164 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1999. A petition for rehearing was denied

[1] The opinion of the court of appeals was not reprinted in the joint appendix. Accordingly, we have reprinted it as an appendix to this brief.

on January 13, 2000. The petition for a writ of certiorari was filed on April 12, 2000, and was granted on September 8, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 922 provides in pertinent part:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(a)(2) provides in pertinent part:

> Whoever knowingly violates subsection * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the

> court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

28 U.S.C. 2255 provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced, pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 176 months' imprisonment. The court of appeals affirmed, 86 F.3d 1164 (1996) (Table), and this Court denied review. 519 U.S. 1094 (1997). Petitioner then filed a motion under 28 U.S.C. 2255 to set aside his sentence, arguing that two of the four prior state convictions that were used to enhance his federal sentence were invalid. The district court denied the motion. The court of appeals affirmed. App., *infra*, 1a-5a.

1. In the early morning hours of October 11, 1992, police officers approached an apartment building where

drug activity was known to be common. J.A. 2; Tr. 32-33, 44-45, 54. When two officers drove up to the front of the building, they saw several people standing there, one of whom fled as soon as the officers stopped and opened the doors of the car. Tr. 32-34. The officers pursued the fleeing man—later identified as petitioner Daniels—and called out "Stop. Police" several times. The man did not stop, but ran along the side of the building and ducked through a hole in a fence. Tr. 9-13, 35-36. Two other officers were on the other side of the fence, in the alley behind the apartment building. In the light from flashlights they were holding, three of the officers saw the man as he came through the fence with a gun in his hand. Tr. 12-13, 49, 63-64. One officer called out to the man to stop and drop the gun. Petitioner dropped the gun, and the officers arrested him. Tr. 43-50.

Petitioner pleaded guilty to a state charge of possession of a firearm by a convicted felon and was sentenced to 16 months' imprisonment. State authorities referred the case to the United States Attorney's Office because petitioner fit the criteria for a career offender under the ACCA.[2] *United States* v. *Daniels*, No. 95-50044, 1996 WL 292231, at *1 (9th Cir. June 3, 1996) (86 F.3d 1164 (Table)). A federal grand jury then charged petitioner with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 2-3. The government sought an enhanced sentence pursuant to

[2] Federal prosecutors obtained a waiver of the *Petite* policy (see *Petite* v. *United States*, 361 U.S. 529 (1960)), under which the Department of Justice generally refrains from bringing a successive prosecution after a state prosecution for substantially the same acts or transactions. See United States Attorneys' Manual § 9-2.031 (Sept. 1997).

the ACCA, which requires a fifteen-year mandatory minimum term of imprisonment for any person who violates 18 U.S.C. 922(g) and who has three previous convictions for a violent felony or serious drug offense or both. J.A. 4-5.

In April 1994, a jury found petitioner guilty of violating Section 922(g)(1). J.A. 58. He was sentenced on January 11, 1995. The district court determined that petitioner was subject to sentencing under the ACCA because he had four qualifying predicate convictions from state courts in California: two for robbery and two for burglary. J.A. 13-18; Gov't C.A. Br. 2-3. Petitioner appealed, arguing that his two California burglary convictions were not qualifying ACCA predicates. The court of appeals rejected that argument, holding that petitioner's burglary convictions satisfied the test set forth in *Taylor* v. *United States*, 495 U.S. 575 (1990). *Daniels*, 1996 WL 292231, at *3-*4. On January 21, 1997, this Court denied a petition for a writ of certiorari. 519 U.S. 1094.

2. On January 16, 1998, petitioner filed a motion under 28 U.S.C. 2255, in which he challenged his federal ACCA sentence. He claimed that the two California robbery convictions used to enhance his federal sentence were unconstitutionally obtained. J.A. 20-57. Petitioner's motion did not state whether he had previously challenged the validity of either of those convictions in state court or on federal habeas corpus. *Ibid.*

Petitioner alleged that the first robbery conviction, which dated from 1978, was unconstitutionally obtained because his guilty plea was not intelligent and voluntary. According to petitioner, the only basis for his liability was aiding and abetting the robbery, and he did not know at the time of his guilty plea that he could

be convicted as an aider and abetter only if he intentionally assisted the commission of the crime. J.A. 37-40. Petitioner's counsel stated that the transcript of the proceeding at which petitioner pleaded guilty to the 1978 robbery is not available. J.A. 38 n.3.

Petitioner alleged that the second robbery conviction, which dated from 1981, was unconstitutionally obtained for two reasons. First, as with his 1978 conviction, petitioner claimed that his guilty plea was not intelligent and voluntary. Second, petitioner claimed that his counsel for the 1981 conviction rendered ineffective assistance by failing to move to suppress a statement made by petitioner following an arrest that allegedly violated the Fourth Amendment. J.A. 40-51. Petitioner did not tender the transcript of the proceeding at which petitioner pleaded guilty to the 1981 robbery, and it is not in the record in this case.

3. The district court denied petitioner's motion under Section 2255 in a written opinion, holding that petitioner was precluded from collaterally attacking his expired state convictions in Section 2255 proceedings. J.A. 58-67. The district court relied on this Court's decision in *Custis* v. *United States*, 511 U.S. 485 (1994), and on later Ninth Circuit decisions applying the rationale of *Custis* to Section 2255 motions. J.A. 60-66. *Custis* holds that a federal defendant may not bring a collateral attack at his ACCA sentencing to the validity of prior state convictions used to enhance the ACCA sentence, with the sole exception of a claim that his prior conviction was obtained in violation of his right to counsel under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). As the district court noted, in *Clawson* v. *United States*, 52 F.3d 806, 809 (9th Cir.) (per curiam), cert. denied, 516 U.S. 897 (1995), and *Contreras* v. *Schiltgen*, 151 F.3d 906, 907 (9th Cir. 1998), the Ninth

Circuit applied *Custis* to preclude attacks on prior state convictions made through the vehicle of a Section 2255 challenge to the federal ACCA sentence. J.A. 64-66.

4. The court of appeals affirmed, reiterating its holdings in *Clawson* and *Contreras* that "[i]n § 2255 proceedings, *Custis* bars federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." App., *infra*, 5a (internal quotation marks omitted). The court found that the rationale of *Custis* extends both to sentencing proceedings in general and to collateral challenges to recidivist sentences based on alleged defects in the prior conviction. *Id.* at 3a.

SUMMARY OF ARGUMENT

In *Custis* v. *United States*, 511 U.S. 485, 487 (1994), this Court held that "a defendant has no * * * right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions" used to enhance a federal sentence. *Custis* involved a defendant's attempt to challenge prior convictions at his federal sentencing proceeding. But the principles of *Custis* apply with equal force in this Section 2255 case, in which petitioner, like the defendant in *Custis*, seeks to collaterally attack his federal sentence on the ground that prior convictions used to enhance that sentence were unconstitutionally obtained.

Neither the statute under which petitioner was sentenced, 18 U.S.C. 924(e), nor any other federal statute or rule provides a basis for permitting the collateral attack he seeks to mount. Accordingly, petitioner may mount his challenge only if it would violate the Constitution to enhance a sentence based on a facially valid prior conviction that a defendant claims was uncon-

stitutionally obtained. But the Court in *Custis* expressly rejected a similar claim by the defendant in that case that the Constitution required that the sentencing court permit his attack on his prior convictions. The Court in *Custis* did recognize a single exception from that rule—convictions assertedly obtained in violation of the right to counsel recognized in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). But the Court explained that exception as based on the unique features of the *Gideon* rule. The exception is therefore of no use to petitioner, who (like the defendant in *Custis*) presents no *Gideon* claim.

The *Custis* holding necessarily applies when a defendant attempts to make a post-conviction collateral attack on an enhanced sentence. If the Constitution prohibited enhancing a defendant's sentence based on facially valid but assertedly unconstitutional prior convictions, it would do so not merely on collateral attack, but at sentencing as well. Indeed, there could be no reason to prohibit claims like petitioner's at sentencing, but to require courts to adjudicate those claims a day—or even an hour—after the sentencing proceedings have been completed. Basic principles that have long governed federal collateral review of criminal convictions make clear that a defendant does not have greater rights to attack his conviction on collateral attack than he would have had on direct review.

The concerns that supported this Court's decision in *Custis* also fully apply in this case. The Court in *Custis* noted that permitting challenges to enhanced sentences based on the fact that the prior enhancing convictions were unconstitutionally obtained would require locating court records and witnesses from other jurisdictions regarding cases that had become final years—or even, as here, decades—earlier. Those difficulties are at least

as serious in a collateral attack (like petitioner's) as in a challenge made at the sentencing proceeding itself (as in *Custis*). Indeed, permitting challenges like those petitioner attempts to bring threatens to provide a way for defendants to circumvent the statutory one-year limitations period that would apply to their prior convictions if they attempted to challenge them directly under Section 2254 or 2255.

The Court in *Custis* also recognized that the defendant's attack on the validity of facially valid prior convictions in a sentencing proceeding for a later crime implicated powerful interests in the finality of criminal convictions. Those same interests are implicated here, since petitioner, like the defendant in *Custis*, attempts to challenge convictions that had long since become final. Moreover, in both cases, the fact that the State whose convictions are at issue is not even a party to the federal proceedings makes fair adjudication of the claim particularly difficult, and it makes invalidation of the conviction a particular affront to finality interests.

Finally, petitioner attempts to rely on appellate decisions that have permitted a Section 2255 challenge to an enhanced sentence when the defendant has already obtained the invalidation of his prior convictions in state court proceedings or federal habeas. Those decisions, however, do not support petitioner's claim here, because petitioner's prior convictions remain facially valid. Petitioner also argues that he should be permitted to challenge the constitutionality of his prior convictions in his Section 2255 proceeding because he is no longer "in custody" on those convictions and it is therefore too late to mount a state or federal collateral attack on them. Petitioner's argument once again challenges the rationale of *Custis*. If petitioner's argument were accepted, there would be no reason to prevent him

from mounting his challenge in the sentencing court; it would serve no purpose to require him to wait to attack his enhanced sentence in a Section 2255 motion. More fundamentally, petitioner may not obtain greater rights to challenge the validity of his prior convictions simply by letting a significant period of time pass and thereby losing the opportunity he once had, under state and federal habeas provisions, to mount such a challenge.

ARGUMENT

A FEDERAL SENTENCE ENHANCED BY A PRIOR CONVICTION THAT HAS NEVER BEEN INVALIDATED BY ANY COURT MAY NOT BE COLLATERALLY ATTACKED UNDER 28 U.S.C. 2255 ON GROUNDS THAT THE PRIOR CONVICTION WAS UNCONSTITUTIONALLY OBTAINED

In *Custis* v. *United States*, 511 U.S. 485 (1994), this Court held that 18 U.S.C. 924(e)—the statute under which petitioner was sentenced—authorizes enhancement of a defendant's sentence on the basis of a facially valid prior conviction, even if the defendant claims that the prior conviction was unconstitutionally obtained. In *Custis*, the defendant argued that, as a matter of statutory construction, Section 924(e) "should be read to permit defendants to challenge the constitutionality of convictions used for sentencing purposes." *Id.* at 490. The Court rejected that claim, noting that Section 924(e) "applies whenever a defendant is found to have suffered 'three previous convictions' of the type specified." *Ibid.* Section 924(e) therefore "focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted" to enhance a defendant's sentence. *Id.* at 491. See also *id.* at 492 (Congress "did not intend to give

defendants the right to challenge the validity of prior convictions under this statute.").

Petitioner accepts the Court's conclusion in *Custis* that, as a matter of statutory construction, Section 924(e) embodies Congress's intent that prior convictions that have not yet been invalidated may be used for sentence enhancement—even if the defendant claims that those prior convictions were unconstitutionally obtained. See Pet. Br. 13 ("As petitioner does not posit section 924(e) as the source of his right to challenge the constitutionality of the predicate priors, that part of *Custis* does not foreclose the argument."). His basic claim in his Section 2255 motion is that enhancing his sentence under Section 924(e) based on facially valid convictions violates the Constitution, because of constitutional errors in those prior convictions. See J.A. 34 (petitioner's "enhanced Armed Career Criminal Act sentence is constitutionally invalid because it is based on two constitutionally invalid prior convictions"). Petitioner concludes that, because his ACCA "sentence is * * * unconstitutional, * * * section 2255 by its express terms lies to remedy a sentence 'imposed in violation of the Constitution.'" Pet. Br. 15-16.[3] See also *id.* at 4 ("A motion under 28

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[3] Petitioner also briefly refers (Br. 16) to the fact that Section 2255 lies to remedy a sentence "otherwise subject to collateral attack." Whatever scope that provision may have, it could not include petitioner's claim in this case. This Court in *United States* v. *Addonizio*, 442 U.S. 178 (1979), held that a nonconstitutional error provides a basis for collateral attack only if the "error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 185 (internal quotation marks omitted); see also *Reed* v. *Farley*, 512 U.S. 339, 353-354 (1994). If the use of a facially valid but assertedly unconstitutional prior conviction to enhance a sentence would create such a "funda-

U.S.C. § 2255 to vacate a sentence imposed in violation of the Constitution provides both an appropriate and necessary vehicle for litigating petitioner's claim.").

Petitioner accordingly may prevail in this case only if he demonstrates that it violates the Constitution to enhance a sentence based on a prior conviction that a defendant alleges to have been unconstitutionally obtained. Our central contention is that, except where the defendant claims that the prior conviction resulted from *Gideon* error, the Constitution is not violated when a conviction that is facially valid is used to enhance a sentence for committing another crime.

A. This Court's Decision In *Custis* Established That, Absent A Claim Of A *Gideon* Violation, Use Of A Facially Valid Prior Conviction To Enhance A Sentence Is Not Unconstitutional

This Court in *Custis* rejected the claim that the Constitution would be violated if a facially valid but assertedly unconstitutional conviction were used to enhance the defendant's sentence. Accordingly, aside from the exception recognized in *Custis* for uncounseled prior convictions obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), it does not violate the Constitution to use facially valid prior convictions (such as petitioner's) to enhance a later sentence, even if the defendant claims (as does petitioner) that the prior convictions are constitutionally defective. As the court below explained, "a § 2255 petition asserts that there

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mental defect," the Court's holding in *Custis* that the sentencing court must overlook that defect would be inexplicable. Thus, if petitioner's ACCA sentence is authorized by statute and if his ACCA sentence is not unconstitutional, then there could be no other "fundamental defect" that could warrant collateral relief under Section 2255.

was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever." App., *infra*, 3a-4a; accord *Ryan* v. *United States*, 214 F.3d 877, 877-878 (7th Cir. 2000) ("A sentence imposed following the approach of *Custis* is lawful and thus not subject to collateral attack under 28 U.S.C. § 2255 as long as the prior convictions remain undisturbed."), petition for cert. pending, No. 00-6554.

1. The defendant in *Custis*, like petitioner here, argued that, "regardless of whether § 924(e) permits collateral challenges to prior convictions, the Constitution requires that they be allowed." 511 U.S. at 493. Like petitioner here, the defendant in *Custis* argued that this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *United States* v. *Tucker*, 404 U.S. 443 (1972), established that principle. See Pet. Br. 8 (*Burgett* and *Tucker* "forbid the use of an unconstitutional prior conviction to enhance a sentence.").

This Court, however, squarely rejected that argument in *Custis*. The Court acknowledged that, for purposes of applying a recidivist statute, *Burgett* and *Tucker* require the conclusion that "admission of a prior criminal conviction that is constitutionally infirm under the standards of *Gideon* is inherently prejudicial and * * * would undermine the principle of *Gideon*." *Custis*, 511 U.S. at 495. But, after noting that the defendant "invite[d] [the Court] to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*," the Court responded that it "decline[d] to do so." *Id.* at 496. The Court's holding was unequivocal: "We hold that a defendant has no * * * right (with the *sole* exception of convictions obtained in violation of the right to counsel) to

collaterally attack prior convictions." *Id.* at 487 (emphasis added).

The Court explained that "since the decision in *Johnson* v. *Zerbst*, [304 U.S. 458 (1938),] and running through our decisions in *Burgett* and *Tucker*, there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect." *Custis*, 511 U.S. at 496. See also *id.* at 494 ("There is * * * a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique."). Such a violation "rises to the level of a jurisdictional defect," and accordingly triggers extraordinary measures. *Id.* at 496. But the claims advanced by the defendant in *Custis*—"denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial," *ibid.*—were not claims of *Gideon* violations. Accordingly, it did not violate the Constitution touse facially valid prior counseled convictions—as to which there was no claim of a *Gideon* violation—to enhance the defendant's sentence.[4]

The same conclusion follows here. Petitioner has alleged that two of his prior convictions are consti-

[4] *Tucker* fails to support petitioner's argument for another reason as well. The defendant in *Tucker*, unlike petitioner, did not attempt to challenge the use of facially valid prior convictions to enhance his federal sentence. Instead, the defendant obtained invalidation of his prior convictions in a state court proceeding, see 404 U.S. at 445, and only then, in a motion under Section 2255 in federal court, argued that his federal sentence was invalid because it was based on a prior state conviction that had already been held invalid by the State involved. Such a claim is distinct from the indirect collateral attack on his prior, facially valid convictions that petitioner seeks to bring here. See pp. 25-26, *infra*.

tutionally invalid. He alleges that his 1978 guilty plea to a robbery charge was not "intelligent and voluntary." J.A. 37. He also alleges that his 1981 guilty plea to another robbery charge was tainted both because it was not "intelligent and voluntary," J.A. 50, and because he received ineffective assistance from his counsel, who failed to file an allegedly meritorious Fourth Amendment suppression motion, *ibid.* Those grounds—lack of a knowing and voluntary guilty plea and ineffective assistance of counsel—are identical to two of the claims advanced by the defendant in *Custis* as the reasons for the invalidity of his prior convictions. See 511 U.S. at 496. The Court held in *Custis*, however, that "[n]one of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Ibid.* On that basis, the Court held that the Constitution did not prohibit the use of facially valid—though assertedly unconstitutional—prior convictions to enhance the defendant's ACCA sentence. That holding disposes of petitioner's claim that his sentence is unconstitutional and hence subject to attack on that basis under Section 2255.

2. If a defendant who is concededly barred by *Custis* from using his federal sentencing proceeding to attack prior state convictions could nevertheless use Section 2255 to accomplish that same objective, *Custis* would be reduced to a curiously futile gesture. A defendant could simply wait for his federal sentencing proceedings to be completed, and then—a day, or perhaps an hour, later—file a Section 2255 motion mounting the same attack on his prior convictions that he was precluded from mounting in his federal sentencing proceeding.[5]

[5] Petitioner argues (Br. 25) that "[f]ederal courts, conducting section 2255 proceedings, are well-suited for resolving the issues

There is no justification for insulating the sentencing court under *Custis* from adjudicating the validity of the prior state convictions, while requiring it to address the same attack as soon as the sentence has become final.

B. Core Principles Governing Collateral Attack On Criminal Convictions Demonstrate That Punishment May Be Imposed Based On A Facially Valid Conviction

1. Basic principles governing collateral review also establish that, aside from cases in which there is a claim of *Gideon* error, the Constitution does not preclude the use of a facially valid but assertedly unconstitutional prior conviction to enhance a sentence. This Court has "reaffirm[ed] the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 166 (1982); see also *United States* v. *Addonizio*, 442 U.S. 178. 184 (1979) ("[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack."). Indeed, any defendant who contests a final judgment of conviction in a subsequent proceeding confronts the principle that when a defendant's "chance to appeal has been waived or exhausted, [a court is] entitled to

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raised by these challenges." Of necessity, federal courts adjudicating collateral attacks do resolve constitutional claims. But there is no basis for petitioner's apparent belief that district courts are in a better position to resolve attacks on prior convictions on collateral review of a sentence than they would be in the sentencing proceeding itself. To the contrary, the district court's focus in the sentencing proceeding on the defendant, his past criminal history, and a wide variety of other potentially relevant subjects makes the sentencing proceeding a far more appropriate time to raise all challenges, including constitutional challenges, to a sentence.

presume he stands fairly and finally convicted." *Frady*, 456 U.S. at 164. See also *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). The presumption attaches, moreover, "even when a collateral attack on a final conviction rests on constitutional grounds." *Parke* v. *Raley*, 506 U.S. 20, 31 (1992).

Contrary to those principles, petitioner claims that a defendant in his position has significantly greater freedom to attack his sentence on collateral review than in the trial court or on direct appeal. Although *Custis* precludes a defendant sentenced as a recidivist from challenging a facially valid prior conviction on constitutional grounds (other than *Gideon* grounds) in the sentencing court or on direct appeal from his sentence, petitioner argues that the identical challenge may be mounted on collateral attack. That argument is inconsistent with the *Frady* principle.

2. More generally, this Court has regularly recognized that there are circumstances in which defendants may suffer consequences from a facially valid final conviction notwithstanding a claim that the conviction was unconstitutionally obtained. For example, this Court has held in a wide variety of settings that defendants may lose the ability to challenge their sentences on constitutional grounds if they have not preserved their claims at trial, on appeal, or on state collateral attack, see *Edwards* v. *Carpenter*, 120 S. Ct. 1587, 1591 (2000), if they have failed to properly exhaust their state remedies, see *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), if they have brought previous federal collateral attacks, see *McCleskey* v. *Zant*, 499 U.S. 467 (1991), or if their attack is based on a new rule of constitutional law, see *Teague* v. *Lane*, 489

U.S. 288 (1989) (plurality opinion). Congress too has imposed strict deadlines for collateral challenges to convictions and other limitations on the availability of federal collateral attack. See, *e.g.*, 28 U.S.C. 2255 (Supp. IV 1998) (one-year statute of limitations and limitations on second and successive Section 2255 motions).

Petitioner had ample opportunity to challenge his prior convictions on constitutional or other grounds at the time those convictions were entered, on appeal, or on federal or state collateral review while he was in custody on those convictions.[6]

His failure to do so resulted in those convictions passing beyond the reach of judicial review.[7] All that is left is an outstanding, facially valid judgment. The

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[6] We have no reason to disagree with petitioner's contention (Br. 16 n.8) that coram nobis does not lie in California for his particular challenges to his prior convictions. Some States, however, do permit coram nobis in a variety of circumstances, thus permitting even defendants no longer in custody to bring their constitutional challenges to prior convictions. See generally Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 Santa Clara L. Rev. 1 (1990); *Skok* v. *Maryland*, 760 A.2d 647 (Md. 2000).

[7] Petitioner argues (Br. 21 n.12) that the ACCA itself was not enacted until after the dates of the prior convictions used to enhance his sentences. A defendant's criminal history, however, is "as typical a sentencing factor as one might imagine," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998), regardless of whether it is taken into account as a result of a statute, a sentencing guidelines system, or merely the court's exercise of sentencing discretion. Accordingly, anyone convicted of a crime is on notice that the conviction may someday be used in a variety of ways to enhance a sentence for a future crime. See *Nichols* v. *United States*, 511 U.S. 738, 748 (1994) (noting that a warning to a defendant "that if he is brought back into court on another criminal charge, [he] will be treated more harshly * * * would merely tell him what he must surely already know").

sentencing court was therefore entitled to take into account defendant's prior facially valid convictions in imposing the ACCA sentence on petitioner.

C. Important Interests In Ease Of Administration And Promoting The Finality Of Judgments Also Refute Petitioner's Claim

This Court in *Custis* referred to two important rationales—"[e]ase of administration" and "[t]he interest in promoting the finality of judgments"—that supported its conclusion that challenges (except for *Gideon* violations) to prior convictions used to enhance a federal sentence may not be brought when that sentence is imposed. 511 U.S. at 496-497. Those rationales provide even greater support for the conclusion that such challenges may not be brought on collateral review of an enhanced sentence.

1. With respect to administrability, the Court explained in *Custis* that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order," but, in contrast, the "determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." 511 U.S. at 496. Moreover, prosecutors, defense lawyers, and witnesses who could provide evidence crucial to the constitutional claims asserted may be deceased or difficult to locate in distant jurisdictions, and those who are available are likely to have only dim memories of events that may have occurred (as here) decades earlier. Those administrative difficulties will be at least as serious in a collateral attack on an

enhanced federal sentence (as here) as in an attack on an enhanced federal sentence at the time it is imposed (as in *Custis*). Petitioner's claims themselves illustrate some of the difficulties.

a. Petitioner has argued that the sentence he is currently serving should not have been enhanced on the basis of his 1978 robbery conviction, because his guilty plea to that robbery charge "was not intelligent and voluntary." J.A. 37, 51. The logical starting place to evaluate that claim would be the transcript of his guilty plea colloquy from two decades ago, but his counsel has acknowledged that the transcript cannot be located. J.A. 38 n.3. That problem is likely to be a common one, since transcripts frequently are not prepared in cases (like many of those resolved by guilty pleas) in which no appeal is taken, and those transcripts that are prepared are likely to be difficult or impossible to locate decades after the event. See *Parke*, 506 U.S. at 30 ("The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old.").

Petitioner has also argued that his 1981 robbery conviction is invalid both because his guilty plea was again allegedly "not intelligent and voluntary," J.A. 50, and because his counsel allegedly rendered ineffective assistance in failing to move to suppress his confession on Fourth Amendment grounds, J.A. 44-50. Once again, petitioner has not tendered the transcript of his 1981 guilty plea colloquy, and it is therefore not clear whether it is presently available. Petitioner's ineffective assistance claim is based on the assertion that his confession was suppressible as the fruit of an arrest without probable cause. Untangling the facts of that arrest many years later to determine whether a Fourth Amendment suppression motion would have been

meritorious—and whether there may have been strategic advantages to petitioner in accepting a plea bargain rather than litigating the admissibility of his confession—poses a daunting challenge. In short, petitioner's claims present even more serious practical problems than did the defendant's claims in *Custis*.

b. The staleness of the claims presented is not an idiosyncratic feature of this particular case. Congress has provided for a one-year statute of limitations for both Section 2254 habeas petitions and Section 2255 motions. See 28 U.S.C. 2244(d), 2255 (Supp. IV 1998). The one-year period generally runs from the date the conviction became final, with exceptions that would not be applicable to petitioner's claims.[8] That limitations period represents Congress's judgment that those with meritorious grounds for collateral attack should act promptly, that claims that fall outside the limitations period are too stale to be fairly litigated, and that "long-deferred challenges that were never presented to the state courts are no longer appropriate grounds of federal relief." *Ryan*, 214 F.3d at 882.

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[8] A different starting date applies under Section 2244 to cases in which "the applicant was prevented from filing [a habeas petition] by * * * State action," 28 U.S.C. 2244(d)(1)(B) (Supp. IV 1998), cases in which the right asserted "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2244(d)(1)(C) (Supp. IV 1998), cases in which there is a later date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. 2244(d)(1)(D) (Supp. IV 1998), and cases in which federal habeas was delayed during the pendency of state post-conviction or other collateral review, 28 U.S.C. 2244(d)(2) (Supp. IV 1998). With the exception of the last ground, Section 2255 provides for similar exceptions.

In cases in which a defendant seeks to collaterally challenge a sentence on the ground that it was enhanced by prior facially valid but assertedly unconstitutional convictions, the prior convictions will ordinarily fall far outside the one-year limitations period. A prior conviction may be used to enhancea sentence under the ACCA only if it was entered before the commission of the felon-in-possession offense. *United States* v. *Talley*, 16 F.3d 972, 977 (8th Cir. 1994). By the time the ACCA defendant has committed the felon-in-possession offense and been apprehended, convicted, and sentenced under the ACCA, any such prior conviction is almost certain to have been final for more than one year.[9] Petitioner's claim, if accepted, would thus lead to the anomalous result that prior convictions that were far too stale to be subject to collateral attack under Sections 2254 and 2255, regardless of their claimed unconstitutionality, would routinely be subject to such attack in the guise of an attack on a federal sentence that used them for enhancement. Petitioner's argument entails that a defendant who is still in custody on a state conviction that has been final for more than a year is time-barred from attacking it, but a defendant who is no longer in custody on such a conviction may

[9] Consider petitioner's own case. He committed the instant offense in October 1992. J.A. 2. He was convicted of the offense in April 1994, see J.A. 58, and he was sentenced in January 1995. See J.A. 7. His conviction became final when this Court denied certiorari on January 21, 1997. 519 U.S. 1094. By that date in 1997, any prior conviction that was entered before his commission of the instant offense in 1992 (and therefore could have been used to enhance that sentence under ACCA) would be very likely to have been final for more than a year. Accordingly, any such conviction would be too stale to come within the one-year limitations period for collateral attacks under Sections 2254 and 2255.

attack it when it is used to enhance his sentence on another offense. That kind of circumvention of the time limits in Sections 2254 and 2255 should not be permitted.

2. The Court in *Custis* also explained that the "interest in promoting the finality of judgments provides additional support for our constitutional conclusion." 511 U.S. at 497. Indeed, "principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing." *Ibid.* As the Court noted in *Parke*, 506 U.S. at 30, a successful challenge to a prior conviction used to enhance a conviction would "deprive [the state-court judgment] of [its] normal force and effect," thus making inroads on the finality that attaches to expired prior convictions. And principles of finality "bear extra weight in cases in which the prior convictions * * * are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" *Custis*, 511 U.S. at 497 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)).

The Court's rationale in *Custis* applies with equal force in this case. Petitioner, who pleaded guilty to the two challenged convictions, has launched a collateral attack on his present sentence, rather than a direct attack as in *Custis*. That difference, however, does not mitigate the costs of reopening the validity of his old convictions. See *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). So long as petitioner's prior convictions remain facially valid, sentencing courts are entitled to rely on them.

Permitting challenges such as petitioner's places the State in a particularly difficult position. A court

adjudicating petitioner's underlying claims would have to pass on the validity of petitioner's prior state convictions in a case in which neither the State whose conviction is at issue nor any state official is a party. The State is in the best position to marshal the factual and legal material necessary to defend its conviction. The absence of the State as a party to the federal proceeding will therefore further increase the risk of an erroneous judgment by federal courts. See *Parke*, 506 U.S. at 31-32 (citing *Loper* v. *Beto*, 405 U.S. 473, 500-501 (1972) (Rehnquist, J., dissenting)). Moreover, a defendant or prisoner who attacks a conviction on grounds like those advanced by petitioner—lack of a knowing and intelligent guilty plea, ineffective assistance of counsel—ordinarily would face a trial and the risk of conviction if the attack is successful; the constitutional error in the proceedings would not immunize the defendant from liability. In this setting, however, a prisoner who prevails on a collateral attack like that of petitioner would reap an undeserved windfall. The State would likely have little incentive to retry the defendant and, if it did, it would have to confront a double jeopardy challenge. Even if retrial were sought and were successful, it is not clear that there would be any means to reinstate the defendant's enhanced ACCA sentence.[10]

[10] In *United States* v. *Clark*, 203 F.3d 358 (5th Cir. 2000), petition for cert. pending, No. 00-122, the Fifth Circuit noted "the apparent anomaly of determining the validity of one jurisdiction's conviction later used for enhancement of another jurisdiction's sentence, without a representative of the jurisdiction of the initial conviction being a party." *Id.* at 365. The court stated, however that the anomaly "is ameliorated by the rule that the determination does not bind the former jurisdiction." *Ibid.* That solution, however, does not ameliorate the problem. In contrast to

D. Petitioner's Other Reasons For Permitting His Indirect Collateral Attack On His Prior Convictions Are Unpersuasive

1. Petitioner notes that a number of courts of appeals have held "that pursuant to federal habeas corpus, a district court may reopen and reduce a federal sentence, once a federal defendant has, in state court, successfully attacked a prior state conviction, previously used in enhancing the federal sentence." Pet. Br. 15 (quoting *United States* v. *Walker*, 198 F.3d 811, 813 (11th Cir. 1999)).[11] This case, however, arises in a different setting. Petitioner has not alleged that he has already obtained a judgment from some other court invalidating the prior convictions used to enhance his

habeas corpus litigation under 28 U.S.C. 2254, in which the State has an opportunity to be heard in defense of its judgment, in this setting the federal court would deprive the state court judgment of its usual significance without ever hearing from the State. Finding that the State has violated the Constitution without the participation of the state representatives in the case is inconsistent with the respect for state court judgments that is a fundamental premise of our federal system. Cf. U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. 1738. See also *Calderon*, 523 U.S. at 555-556. In addition, taking that course would still lead to anomalous situations in which a prior conviction may not be used to enhance a federal sentence (because it has been proven to be invalid in a Section 2255 proceeding) but it may be used to enhance a later state sentence (since it remains valid as against the State). It is unclear whether a defendant in that situation would be able to obtain relief in a still later Section 2254 attack on the subsequent enhanced state sentence.

[11] See also *United States* v. *LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States* v. *Pettiford*, 101 F.3d 199, 201-202 (1st Cir. 1996); *United States* v. *Bacon*, 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States* v. *Cox*, 83 F.3d 336, 339 (10th Cir. 1996); *United States* v. *Nichols*, 30 F.3d 35, 36 (5th Cir. 1994).

federal sentence. From all that appears in the record, petitioner either failed to employ the procedures available to attack those convictions or failed to win relief. Instead, he seeks to employ Section 2255 itself to bring a collateral attack on his expired prior convictions. *Custis* holds that he could not bring that challenge during the federal sentencing proceedings. The logic of *Custis* dictates that he may not bring his collateral challenge to his prior convictions under Section 2255 either.

2. Petitioner argues (Br. 14) that *Custis* "did not bar challenges to [prior] convictions in forums other than the sentencing hearing." Petitioner refers to the end of the Court's opinion in *Custis*, where the Court stated that it "recognize[d] * * * that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in [state court] or through federal habeas review." 511 U.S. at 497. The Court also stated that "[i]f Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." *Ibid.* The Court added, however: "We express no opinion on the appropriate disposition of such an application." *Ibid.*

The Court's statements in *Custis* are not an endorsement of petitioner's position. Pet. Br. 14. To the contrary, the Court's careful language states only that, if the defendant could obtain invalidation of his prior convictions in another forum, he "may then *apply* for reopening of any federal sentence enhanced by the state sentences." 511 U.S. at 497 (emphasis added). Far from deciding whether such an application could result in relief from the enhanced federal sentence, the Court "express[ed] no opinion on the appropriate

disposition of such an application." *Ibid.* And in any event, because petitioner has not been "successful in attacking [his] state sentences," resolution of the question reserved by the Court in *Custis* could not assist him. See *Turner* v. *United States*, 183 F.3d 474 (6th Cir. 1999), cert. denied, 120 S. Ct. 1255 (2000); *Arnold* v. *United States*, 63 F.3d 708, 709-710 (8th Cir. 1995).

3. Petitioner argues (Br. 16) that "[w]here no other forum exists to litigate the constitutionality of the prior convictions," such as where the defendant is no longer "in custody" on those convictions and thus may not attack them under Section 2254, see *Maleng* v. *Cook*, 490 U.S. 488, 491-492 (1989) (per curiam), collateral challenges like his should be permitted. See *United States* v. *Clark*, 203 F.3d 358, 363 (5th Cir. 2000), petition for cert. pending, No. 00-122.

Petitioner's argument is inconsistent with *Custis*. Petitioner argues that the fact that an ACCA defendant is no longer "in custody" on prior enhancing convictions is sufficient to warrant permitting him to challenge those prior convictions through an attack on his ACCA sentence. If that is correct, however, then there would be no reason to require him to wait for a collateral attack on his ACCA sentence, rather than bringing the challenge at the time of sentencing. Accordingly, petitioner's argument, if correct, would directly challenge this Court's holding in *Custis* that such challenges cannot be brought at the time of sentencing.

Petitioner errs (Br. 17) in stating that *Maleng* v. *Cook*, *supra*, "sanctioned the use of habeas corpus * * * to challenge the constitutionality of an expired prior conviction—on grounds other than the denial of counsel—to the extent it is used to enhance a current

sentence." That is not the holding or implication of this Court's decision in *Maleng*. The Court's *per curiam* opinion in *Maleng* held that a state habeas petitioner's constitutional challenge to prior state convictions on which the petitioner was no longer in custody "can be read as asserting a challenge to [later, still custodial] sentences, as enhanced by the allegedly invalid prior conviction." 490 U.S. at 493. On that basis, the Court concluded that the habeas petitioner "has satisfied the 'in custody' requirement for federal habeas jurisdiction." *Id.* at 494.

Petitioner, like the prisoner in *Maleng*, is "in custody" under his ACCA sentence. But the Court in *Maleng* pointedly stated that its "holding is limited to the narrow issue of 'custody' for subject-matter jurisdiction of the habeas court." 490 U.S. at 494. And the Court then expressly declined to rule on the question presented in this case, noting that it "express[ed] no view on the extent to which the [expired] conviction itself may be subject to challenge in the attack upon the [later] sentences," *ibid.* Accordingly, *Maleng* provides no support for petitioner's argument.

More fundamentally, petitioner's argument turns principles of collateral review on their head. Petitioner's argument is that, because he is barred from one form of collateral relief (a Section 2254 attack on his prior state conviction), he should be permitted to obtain another form of collateral relief (an indirect attack on that conviction through a Section 2255 attack on his enhanced federal conviction) that would otherwise be unavailable. The purpose of the "in custody" requirement of Section 2254, however, is in part to set forth an outer bound on the availability of federal collateral relief for a state criminal conviction. See *Ryan*, 214 F.3d at 882 ("Honoring judgments that remain outstanding after full opportunity for direct and collateral review does not *dis*honor the constitutional claims the defendant wishes to make. It simply establishes rules for presenting these claims to the right court, and in a timely fashion."). A defendant's failure to satisfy the "in custody" requirement accordingly means that Congress intended that his prior conviction has attained a degree of finality that puts it beyond the reach of federal collateral attack; it does not suggest that he should thereby be granted the right to challenge his prior conviction (which he could not challenge at sentencing) through a later collateral attack.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-55097

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

EARTHY D. DANIELS, JR.,
DEFENDANT-APPELLANT

Argued and Submitted Sept. 30, 1999
Decided Oct. 21, 1999

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON,
Circuit Judges

FERNANDEZ, Circuit Judge:

Earthy D. Daniels, Jr., appeals the denial of his 28 U.S.C. § 2255 motion in which he sought to challenge the constitutionality of two state convictions, which were used in sentencing him under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). We affirm.

BACKGROUND

Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court determined that Daniels, who had four prior convictions, was subject to the ACCA and sentenced him to imprisonment for 176 months. Daniels appealed to this court. He asserted that the district court's conclusion that his two California burglary convictions constituted predicate offenses under the ACCA was incorrect. In an unpublished disposition, we rejected that assertion. *See United States v. Daniels*, No. 95-50044, 86 F.3d 1164, 1996 WL 292231, at * 3-4 (9th Cir. June 3, 1996).

Daniels then filed a § 2255 motion to set aside, vacate or correct his federal sentence, and collaterally attacked his two California robbery convictions, which were also used to enhance his sentence. Although he claimed that he had been unconstitutionally convicted, he did not contend that he was denied the right to counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), in either case.

The district court denied his motion on the ground that he could not maintain that collateral attack under § 2255. He then appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 22 U.S.C. § 2253(a). We review denials of petitions under 28 U.S.C. § 2255 *de novo*. See *Sanchez v. United States*, 50 F.3d 1448, 1451 (9th Cir. 1995).

DISCUSSION

In *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994), the Supreme Court declared that, except for *Gideon*[1] challenges, a defendant may not collaterally attack prior state convictions in sentencing proceedings where the ACCA is being used to enhance the sentence. The statute does not permit it. *See id.* at 490, 114 S. Ct. at 1735. The Constitution does not require it. *See id.* at 497, 114 S. Ct. at 1739. Concomitantly, ease of administration and the interest in finality argue against it. *See id.* at 496-97, 114 S. Ct. at 1738-39.

We have recognized the force of the *Custis* reasoning and have, therefore, expressly determined that it applies to sentencing proceedings in general. *See*, e.g., *United States v. Ricardo*, 78 F.3d 1411, 1415 (9th Cir. 1996); *United States v. Price*, 51 F.3d 175, 177 (9th Cir. 1995); *United States v. Alexander*, 48 F.3d 1477, 1494-95 (9th Cir. 1995); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994). In the same vein, we have decided that, on other than *Gideon* grounds, a defendant may not collaterally challenge a state conviction through the medium of a motion seeking dismissal of his indictment. *See United States v. Zarate-Martinez*, 133 F.3d 1194, 1199-1200 (9th Cir.), *cert. denied*, 525 U.S. 849, 119 S. Ct. 123, 142 L.Ed.2d 99 (1998).

But, says Daniels, we have not yet decided that collateral attacks on state convictions cannot be brought under § 2255. If he were correct, we would doubt that they could be brought. Among other things, a § 2255

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[1] See *Gideon*, 372 U.S. at 342-45, 83 S. Ct. at 795-97.

petition asserts that there was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever. As it is, Daniels is not correct.

In *Clawson* v. *United States*, 52 F.3d 806 (9th Cir. 1995), a defendant brought a § 2255 motion and asserted that his federal sentence under the ACCA "was improperly enhanced through use of a state conviction that later became nonfinal when his appeal from the state judgment was reopened, *and* was unconstitutionally obtained." *Id.* at 807 (emphasis added). We responded:

> We hold that there is no finality requirement in the version of the ACCA under which Clawson was sentenced, and that under *Custis*, there is no constitutional right to collaterally attack the validity of a state conviction in a federal sentencing hearing on any basis other than denial of the right to counsel. . . .

Id. (emphasis added). If that were not clear enough, we returned to the topic in a case which, though not a § 2255 matter, called upon us to expatiate on *Clawson*. We explained that, in *Clawson*, "[w]e read *Custis* to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras v. Schiltgen*, 151 F.3d 906, 907 (9th Cir. 1998).

We believe that we have spoken with a good deal of clarity, but because Daniels does not find it so, perhaps others are of the same mind as he. We hesitate to leave

uncertainty hovering about an issue that is so quotidian. Therefore, we restate our position here.[2]

CONCLUSION

We return to the § 2255 locale in order to clear away any bosk that still obscures our position regarding collateral attacks on prior convictions.

In § 2255 proceedings, *Custis* bars "federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras*, 151 F.3d at 907.

AFFIRMED.

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[2] Incidentally, Daniels's invocation of our decision in *Brock v. Weston*, 31 F.3d 887, 889-91 (9th Cir. 1994), does not alter the result. That case dealt with a 28 U.S.C. § 2254 petition, which can be a vehicle for challenging state convictions in proper circumstances. *See id.* at 890-91 & nn. 6 & 7; *see also Allen v. Oregon*, 153 F.3d 1046, 1049-50 (9th Cir. 1998); *Gretzler v. Stewart*, 112 F.3d 992, 1004-05 (9th Cir. 1997), *cert. denied*, 522 U.S. 1081, 118 S. Ct. 865, 139 L.Ed.2d 763 (1998); *Price*, 51 F.3d at 177. It is not relevant to this proceeding.

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No. 99-9136

In The

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

A. *Custis* Did Not Constitutionalize ACCA Sentences Tainted by Unconstitutional Prior Convictions

In *Custis v. United States*, 511 U.S. 485 (1994), this Court held that facially valid (but potentially unconstitutional) prior convictions could not be challenged at the sentencing hearing unless they were tainted by a violation of the right to counsel. Respondent argues that *Custis* also necessarily held that a sentence based on potentially unconstitutional prior convictions (for reasons other than *Gideon*[1] violations) was not itself unconstitutional. See Resp. Br. 10, 12. That is wrong. *Custis* did not constitutionalize sentences founded on unconstitutional prior convictions; it merely restricted litigation of that issue at sentencing to violations of the right to counsel. By allowing for the possibility that a defendant could move to reopen his federal sentence if the prior conviction was subsequently vacated on habeas, *Custis* implicitly suggested that a sentence based on an unconstitutional prior conviction – even one facially valid at the time of sentencing – was itself unconstitutional. *Custis v. United States*, 511 U.S. 485, 497.

Once the legitimacy of reopening the federal sentence is acknowledged, the fallacy of respondent's argument becomes apparent. The sentence is not beyond challenge; it is not immutably constitutional because the prior conviction was facially valid at the time of sentencing. At most, it is presumptively constitutional absent a showing that the prior conviction is unconstitutional, and *Custis*

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[1] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

stands for nothing more than the unremarkable proposition that the federal sentencing hearing is not the proper forum to show that prior convictions (except for *Gideon* violations which will be readily apparent) were unconstitutionally obtained. Nothing in the language of *Custis* suggests that it reversed the longstanding principle that it violates due process to base a sentence "upon misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447 (1972).

Under respondent's interpretation of *Custis*, an ACCA sentence predicated upon prior convictions that suffered from obvious and severe constitutional infirmities would not violate due process so long as the prior convictions were not tainted by *Gideon* violations. This would necessarily include convictions tainted by constitutional violations that, like *Gideon* violations, were historically cognizable on habeas corpus even before the expansion of its reach. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony cognizable on federal habeas); *Moore v. Dempsey*, 261 U.S. 86 (1923) (due process violation where conviction obtained under pressure of mob violence cognizable on federal habeas). And even if the defendant could prove a constitutional violation had prevented him from conclusively demonstrating his innocence of the prior crime, perhaps based on DNA testing, respondent would still require that the underlying conviction be used to impose an enhanced sentence – as long as the conviction had not

been vacated in other proceedings.[2] *Custis* did not so hold.

The near unanimity of the Circuit Courts in allowing a reopening of the federal sentencing once the prior conviction has been successfully attacked provides persuasive evidence of this fact. *See United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (collecting cases). If *Custis* truly held, as respondent suggests, that only prior convictions tainted by *Gideon* violations were constitutionally barred as sentence enhancements, there would be no need to reopen the federal sentencing if those prior convictions were subsequently vacated on any grounds other than lack of counsel. These cases make clear that other constitutional violations are relevant to the legality of the federal sentence.

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[2] Both amicus and respondent fault defendants who failed to challenge the primary effect of their convictions while still under their custody, arguing that they have effectively waived any constitutional challenges, even when the conviction is used for a different purpose. Resp. Br. 18; Amicus Br. 7. Their argument, however, rests on a false assumption – that defendants will always have an opportunity (either by direct appeal or collateral review) to challenge the constitutionality of their convictions. Many constitutional violations, such as ineffective assistance of counsel claims, knowing use of perjured testimony, and suppression of favorable defense evidence, may not be raised on direct appeal because they depend on evidence outside the record of trial. Many of these same claims may also be beyond the reach of habeas litigation because the defendant was no longer in custody at the time the claims were discovered or after the direct appeal was finished. And as argued in petitioner's brief, a defendant may have failed to challenge the prior convictions in state court for many reasons that do not imply a waiver. Pet. Br. 21-22.

1. Respondent further supports its argument by observing that allowing an attack on the prior conviction at a section 2255 proceeding would reduce *Custis* to a "curiously futile gesture" because the defendant could subsequently mount the identical challenge precluded by *Custis* at the sentencing hearing. Resp. Br. 15. Again, respondent is wrong.

First, shifting the forum from sentencing to a section 2255 proceeding automatically narrows the class of available claims, preserving judicial resources. *See, e.g., Ryan v. United States*, 214 F.3d 877, 886 (7th Cir. 2000) (Wood, J., dissenting) ("Well established principles governing § 2255 proceedings would leave the door open to that far smaller universe of complaints."), petition for cert. pending, No. 00-6554. Second, because the defendant bears the entire burden, a section 2255 court can quickly dispose of insubstantial claims. *See, e.g.*, Rule 4(b) of the Rules Governing § 2255 Proceedings ("If it plainly appears from the face of the motion and the annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal. . . . "). Third, section 2255 procedures provide the Government with additional defenses to the challenge to the sentence. *See, e.g.*, Rule 9(a) of the Rules Governing § 2255 Proceedings ("A motion for relief pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing. . . . "). Finally, shifting some claims to a section 2255 proceeding makes practical sense because it relieves the sentencing court from having to litigate potentially complex challenges at a routine sentencing hearing.

These claims are more appropriately litigated in a section 2255 proceeding where there are specifically established rules and procedures to govern claims requiring factual development and to resolve disputed facts. *See, e.g.*, Rules Governing § 2255 Proceedings.

2. Respondent references this Court's general pronouncements in *United States v. Frady*, 456 U.S. 152 (1982) that relief on collateral review requires a higher showing than on direct appeal. This principle, respondent reasons, demonstrates that a section 2255 challenge cannot lie where the same challenge may not be made at sentencing or on direct appeal because that would allow the defendant "greater freedom to attack his sentence on collateral review than in the trial court or on direct appeal." Resp. Br. 16-17. Respondent, however, confuses the standard for review with the availability of review. *Frady* does not address the latter issue.

Certainly, if the statute permitted attacks on the prior conviction at sentencing, then, under *Frady*, the district court's decision on its validity would be entitled to deference on direct appeal and even greater deference on collateral review in a section 2255 action. That principle, however, does not apply where the initial challenge has been deferred to a section 2255 proceeding. Under respondent's interpretation of *Frady*, ineffective assistance of counsel claims that require further factual development could not be entertained in a section 2255 proceeding because they could not properly be brought at trial or on direct appeal. That is at odds with both the

law[3] and respondent's position in other cases.[4] Because petitioner's initial challenge to the constitutionality of his sentence is properly brought in a section 2255 proceeding, *Frady* does not bar relief.

This fact, that petitioner is challenging his federal sentence (and not his state court conviction), also answers respondent's contention once the defendant's right to review the prior conviction has passed or been forfeited, it may be used notwithstanding any potential constitutional violation. Resp. Br. 17-19. Each of the cases cited by respondent[5] involves challenges to the validity of the primary conviction, and, in each case, the Court held that the defendant could no longer challenge the validity of that conviction. Again, petitioner does not quarrel with that general proposition. Petitioner does not seek to

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[3] *See, e.g., United States v. Bosch*, 951 F.2d 1546, 1549 (9th Cir. 1991) (customary procedure for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255 because such a claim cannot be advanced without the development of facts outside the original record); *United States v. McLean*, 138 F.3d 1398, 1406 (11th Cir. 1998) (ineffective assistance of counsel claim properly heard in section 2255 proceeding to allow fact-finding).

[4] "The Government argues that a defendant can attack the actual performance of trial counsel only through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly raised in the District Court nor preserved for review on appeal." *United States v. Cronic*, 466 U.S. 648, 667, n.42 (1984).

[5] *Edwards v. Carpenter*, 120 S.Ct. 1587, 1591 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1999) (plurality opinion).

vacate his California convictions in this action. He merely challenges their use to enhance his federal sentence.[6]

B. Adjudicating the Constitutionality of Petitioner's Prior Convictions at a Section 2255 Proceeding Poses No Undue Administrative Burdens and No Danger to Federalism Interests

1. Respondent argues that administrative difficulties, invoked by *Custis* in support of its decision to bar challenges at sentencing, will be at least as serious in a section 2255 proceeding as they would be at a sentencing hearing. Resp. Br. 19-20. Respondent points to the difficulty in obtaining transcripts and the problems associated with litigating facts from years past as a reason to deny petitioner the opportunity to prove his claims. Those problems, however, are petitioner's problems, not the court's and not respondent's. At a section 2255 proceeding, petitioner bears the burden of proving his claims. *Frady*, 456 U.S. at 156. Thus, if transcripts are unavailable, petitioner may fail to meet his burden. *Cf. Parke v. Raley*, 506 U.S. 20 (1992) ("Due Process Clause permits a State to impose a burden of production on a recidivism defendant who challenges the validity of his prior conviction under *Boykin*"). If witnesses cannot be obtained because of the passage of time, petitioner may fail to meet his burden. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 46 (1995)

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[6] For that same reason, respondent's reference to the statute of limitations is beside the point. Resp. Br. 18. Petitioner's challenge to his federal sentence was timely under any standard.

("because the habeas petitioner generally bears the burden of proof, delay is apt to disadvantage the petitioner more than the State"). As petitioner is the party disadvantaged by the practical problems associated with litigating these claims, that difficulty provides no reason to preclude the litigation.

Moreover, that the litigation of the constitutionality of the sentence imposes some burdens on the court and litigants does not, alone, provide sufficient reason to close the courthouse doors. All parties retain a vital interest in ensuring that federal sentences rest on a constitutional foundation. On balance, due process requires that the smaller burden associated with litigating the claim give way to vindication of the more important interest in assuring a constitutional sentence. *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972) (state's interest in convenience and efficiency must yield to unwed fathers' due process right to a hearing on his parental fitness before his children could be taken from him upon death of natural mother); *Needer v. United States*, 119 S.Ct. 1827, 1848 (1999) (Scalia, J., dissenting) (state's interest in expediency and convenience must yield to constitutional right to jury trial – even if the defendant is unquestionably guilty).[7]

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[7] In any case, the potential burden on the federal courts appears relatively insignificant. According to statistics compiled by the United States Sentencing Commission, only 232 people were sentenced as armed career criminals in 1999. U.S. Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics* 45. Presumably, a much smaller percentage of that number will be in a position to mount a credible section 2255 challenge to their sentence.

2. Respondent also argues that allowing an attack on the federal sentence as enhanced by the prior conviction allows defendants to circumvent the one-year statute of limitations set out in sections 2254 and 2255. Plainly it does not. As noted earlier, petitioner filed his action well within the one-year limitations period. Respondent's argument again confuses an attack on petitioner's current sentence with an attack on petitioner's prior state conviction. The latter is clearly time-barred, and petitioner does not seek reversal of that conviction. He seeks only to litigate its constitutional reliability as a predicate for enhancing his federal sentence. There is no anomaly. Unlike a collateral attack under section 2254, success in the current section 2255 action would impact only the federal sentence and would have no effect on the state court judgment. By contrast, when a section 2254 writ is granted, the federal court usually vacates the state court judgment. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring & dissenting) ("state courts routinely see their criminal convictions vacated by federal district court judges").

3. Similarly, that distinction substantially answers the finality concerns raised by respondent. Respondent cites *Calderon v. Thompson*, 523 U.S. 538 (1998) as illustrative of the "costs of reopening the validity of [petitioner's] old convictions." Resp. Br. 23. Closer examination of those "costs" reveals that they are not incurred in this case.

In *Calderon v. Thompson*, the Court observed that the exercise of habeas jurisdiction often came at the expense of the State's interest in the finality of convictions. The Court cataloged the important societal interests served by

finality of judgments. Foremost was the State's interest in executing its judgment: "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* at 556. Petitioner's attack on his sentence does not implicate that finality interest; the state has already executed its judgment, and it has been fully carried out. Nothing remains on that score.

For that same reason, the finality interest in preserving the balance between the states and the federal government is not implicated here. That balance is upset where the state cannot enforce its own criminal judgments. *Id.* at 555-556. Again, the state has completely enforced its judgment in the cases underlying the prior convictions, and this proceeding will not change that fact.

The final two interests served by finality are the deterrent effect of a final judgment and the enhancement of the "quality of judging" when state court judges are allowed to have the final word on the judgment. *Id.* at 555. Again, because petitioner has fully served his state sentences and received all the punishment due him for those crimes, he has necessarily experienced the full deterrent impact of those judgments of imprisonment. Similarly, because petitioner does not seek to overturn the state court judgments, there is no reason for state court judges to fear the federal court "looking over their shoulder" and invalidating their work. The adverse impact on finality typically associated with habeas review of state court judgments is just not implicated when the federal court reviews its own judgment and sentence,

examining the state court conviction solely within that context.

4. Respondent also argues that the court will be in a difficult position adjudicating the validity of prior state convictions where the State is not a party. Because the State is in the best position to marshal the factual and legal material necessary to defend its conviction, its absence will "increase the risk of an erroneous judgment." Resp. Br. 24. Again, that argument misses the point as demonstrated by the very case cited by respondent in support of its argument, *Parke v. Raley*, 506 U.S. 20, 31-32 (1992). In the cited passage, the Court acknowledged that "serious practical difficulties will confront any party assigned an evidentiary burden in such circumstances." In recognition, however, of the collateral nature of the challenge to the prior conviction, the Court found that assigning that burden (as well as the risk of error) to the defendant was not fundamentally unfair. Here, as well, petitioner, not the Government, bears the burden and risk of error inherent in the difficulty in obtaining records and evidence.[8]

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[8] Indeed, if the State truly retained an interest in seeing that its judgment retain the conclusive force as a federal sentence enhancement, it could conceivably join the litigation. Rule 12 of the Rules Governing Section 2255 Proceedings gives the district court the authority to "apply the . . . Federal Rules of Civil Procedure . . . to motions filed under these rules." Fed.R.Civ.P. 24(a) allows a party to intervene in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. . . . " *See, e.g., State of Arizona v. Hunt*, 408 F.2d 1086 (6th

5. Finally, respondent alludes to the "windfall" petitioner will receive if he successfully demonstrates that the state court conviction suffered from a constitutional defect that undermined its reliability as federal sentencing predicate. Respondent argues because there is no possibility of a retrial, unlike a successful challenge to the conviction in a section 2254 proceeding, the constitutional error will immunize the defendant from liability. Resp. Br. 24. There is, however, no windfall and no immunity. Again, respondent confuses the challenge to the federal sentence with a challenge to the state court conviction. While there is no possibility of retrying him, there is no need. Petitioner has suffered and still suffers the state court convictions. All that it means is that the Government may not use the prior conviction to lengthen petitioner's federal sentence.[9]

Cir. 1969) (Attorney General of the State of Arizona allowed to intervene in a habeas corpus proceeding in federal court in Michigan defended by the Michigan Attorney General implicating constitutionality of Arizona trial of habeas petitioner).

[9] This distinction between punishment for the state prior conviction and its use to enhance a subsequent federal sentence is the same distinction that insulates recidivist statues from constitutional attack on double jeopardy grounds. *See, e.g., United States v. Bates*, 77 F.3d 1101, 1106 (8th Cir. 1996) (ACCA sentence does not violate double jeopardy because prior convictions are merely used to enhance current offense). Recidivist statutes "do not change the penalty imposed for the earlier conviction." They merely increase the penalty for the last offense committed by the defendant. *Nichols v. United States*, 511 U.S. 738, 747 (1994). By the same token, an attack on the prior conviction in this context is an attack on the current federal sentence and not the state court judgment.

Respondent next argues that this would result in an anomaly in that the prior conviction may not be used to enhance a federal sentence but may be used to enhance a later state sentence. Respondent asserts that this is inconsistent with the "respect for state court judgments that is a fundamental premise of our federal system." Resp. Br. 24-25, n.10. As stated before, allowing a defendant to challenge the use of a prior conviction to enhance his federal sentence does not dishonor the state court judgment. The state can have no interest in any collateral consequences attached to its judgment in a different jurisdiction. As long as the federal government honors the direct consequence of the state court judgment – conviction and imprisonment of the defendant[10] – it does not dishonor the state's judgment to fail to accord it conclusive weight for its collateral use to lengthen a federal sentence.[11]

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[10] And of course, even where a federal court directly "dishonors" the state court judgment by granting a writ under 28 U.S.C. § 2254, reversing the conviction and freeing the defendant, it does not violate the Full Faith and Credit Clause of the Constitution. U.S. Const. Art. IV, § 1. Resp. Br. 25, n.10. The federal courts do so as a "bulwark against convictions that violate 'fundamental fairness.' " *Engle v. Issac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

[11] All of the concerns noted by respondent are implicated whenever a defendant challenges the validity of a prior state conviction that is used to enhance a federal sentence. Although 21 U.S.C. § 851 specifically allows such challenges, neither the Government nor any state has suggested that section 851 violates the principles underlying our federal system.

C. Petitioner's Custody Under the ACCA Sentence Allows Him to Challenge His Sentence to the Extent it Was Enhanced by Unconstitutional Prior Convictions

Petitioner is still in federal custody, serving his ACCA sentence; he is no longer in state custody on the state court convictions that served as the predicate for his ACCA sentence. Respondent contends that this latter fact puts the constitutionality of the prior conviction beyond the "reach of federal collateral attack." Resp. Br. 29. Although the state court judgment is beyond the reach of collateral attack, its constitutional reliability as the predicate for a federal sentence is not.

Maleng v. Cook, 490 U.S. 488 (1989) (per curiam) specifically found habeas jurisdiction to challenge a custodial sentence as enhanced by an invalid prior conviction. *Maleng*, 490 U.S. at 493-494. That *Maleng* found custody for subject-matter jurisdiction under those circumstances necessarily implies that a habeas court could litigate the validity of the prior conviction to the extent that it was used to enhance the custodial sentence. Respondent erroneously asserts that the Court reserved this question when it observed that it was not expressing a view on the extent that the prior conviction itself may be subject to challenge in the attack on the later sentence. Resp. Br. 28. That is wrong. *Maleng* decided that a defendant could challenge the use of the prior conviction to enhance his sentence. If not, there would be no point to finding habeas jurisdiction for the court to decide a question it could not decide. Instead, *Maleng* left open the question of whether the prior conviction itself could be vacated

(on habeas review of the custodial sentence), rendering it void.[12]

CONCLUSION

The Constitution does not countenance federal sentences predicated on unconstitutional and unreliable prior convictions; a section 2255 proceeding provides an appropriate forum for litigating for that claim. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[12] *See, e.g., Coss v. Lackawanna*, 204 F.3d 453, 472 & n.9 (3d Cir. 2000) (Rendell, J., concurring & dissenting), *cert. granted*, 121 S.Ct. 297 (Oct. 10, 2000) (noting that majority's remedy for finding of an unconstitutional prior conviction – grant of writ conditioned upon resentencing without enhancement *or* retrying earlier charge – implicitly resolves *Maleng's* open question).

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IN THE

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant may use 28 U. S. C. § 2255 to challenge his sentence based on a claim that the expired state convictions used to enhance his sentence under the ACCA are constitutionally invalid?

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IN THE

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, defendant seeks to escape the sentencing effect of multiple prior convictions based on a claim he could have brought long ago and which cast little, if any, doubt on his

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

actual guilt of the priors. Such evasion of habitual criminal sentencing is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Earthy Daniels was convicted of possession of a firearm by a felon. See Brief for Petitioner 1-2. The sentencing court found he had four prior convictions for violent felonies: first-degree burglary in California in 1977 and 1979[2] and robbery in 1978 and 1981. J. A. 14. The court found that an allegation of a prior juvenile adjudication for burglary was not sustained. J. A. 14-15. Application of the Armed Career Criminal Guideline made the adjusted offense level 31 instead of 22, for a guideline range of 188-235 months instead of 84-105 months. J. A. 12, 15. The actual sentence, with a further departure for time in state custody, was 176 months, *i.e.*, 14 years, 8 months. J. A. 18.

The sentencing court declined to consider any challenges to the priors, citing *Custis* v. *United States*, 511 U. S. 485 (1994). J. A. 13 Following affirmance on appeal, see *United States* v. *Daniels*, 86 F. 3d 1164 (CA9 1996) (Table), Daniels filed a motion under 28 U. S. C. § 2255 attacking the priors. J. A. 20-57. The District Court found that the attack on the priors was precluded by the Ninth Circuit's interpretation of *Custis* in *Clawson* v. *United States*, 52 F. 3d 806 (CA9 1995) and *Contreras* v. *Schiltgen*, 151 F. 3d 906 (CA9 1998). J. A. 64-65. On appeal, the Ninth Circuit affirmed on the same basis. *United States* v. *Daniels*, 195 F. 3d 501, 503 (CA9 1999).

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2. At the times of these offenses, first degree was burglary of a dwelling at night. See Cal. Stat. 1976, ch. 1139, § 206.5; Cal. Stat. 1978, ch. 579, § 23. The nighttime requirement has since been repealed. Cal. Stat. 1982, ch. 1290, § 1.

SUMMARY OF ARGUMENT

Enhanced sentencing for habitual criminals is an important component of society's effort to protect innocent people. Priors should not be disregarded for sentencing on any ground that does not gravely undermine our confidence in actual guilt of the prior offense.

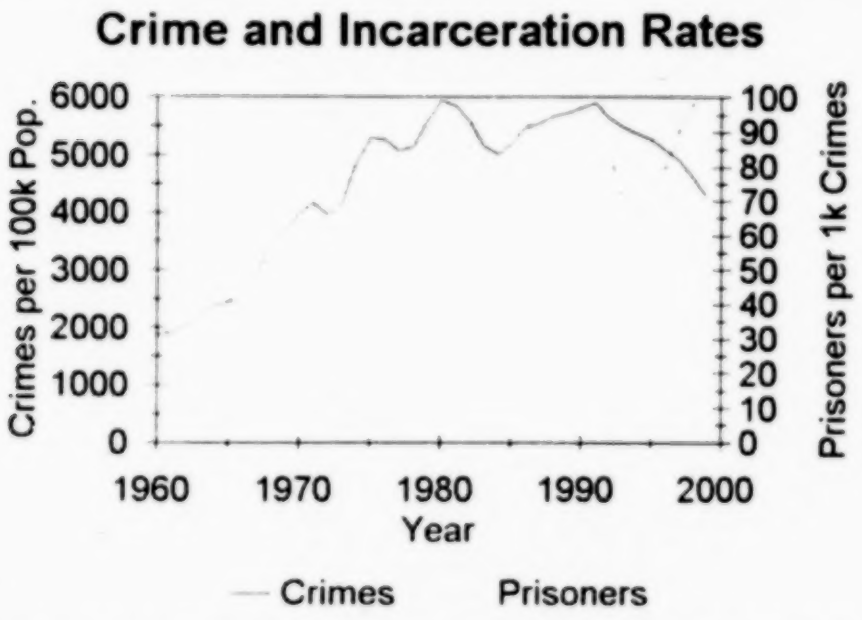
The grounds for attacking a judgment are not fixed, but rather diminish at each stage of proceedings. The impact of a particular claimed error on reliability of the result is a major factor in deciding how long to allow the claims. *Custis* v. *United States* considered and rejected the argument that collateral attacks on priors must be allowed for constitutional claims other than *Gideon* error. Claims such as those in the present case cast little doubt on guilt of the priors, and neither law nor justice requires that they be entertained.

ARGUMENT

I. For the protection of innocent people, society must identify and restrain habitual criminals.

A. The Harm Done by Habitual Criminals.

At long last, America is making progress against crime. As the solid line in Figure 1 shows, the rate of FBI Index Crime has fallen 28% from the 1980 peak of 5,950.0 index crimes per 100,000 population to 4,266.8 in 1999. See Federal Bureau of Investigation, Crime in the United States 1999, p. 64 (2000) (1980-1999 data). While this is progress, we have much further to go, as a comparison with the 1960 rates shows. The rates of forcible rape and robbery each remain about 3.4 times the respective 1960 rates. Compare *ibid.*, with U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 3.120, p. 266 (2000) (1960-1998 data). That means about 246,000 people were robbed and



63,000 were raped who would not have been if crime rates were at 1960 levels.

Crime is a complex problem with multiple causes and hence no one solution. The criminal justice system is responsible for one vital component of a multi-front attack on crime: punishment. The importance of this component must not be underestimated. The dotted line in Figure 1 shows the strength of sentencing policy as measured by the number of criminals in custody relative to the crime rate. Sourcebook, *supra*, Table 6.43, at 516 (data for graph). Lenient sentencing in the 1960s and 1970s was followed by a skyrocketing crime rate, and tougher sentencing from the 1980s forward was followed by a dropping crime rate. This is not a coincidence. See Scheidegger & Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Pol'y Rev. 59, 60 (1999).

There are three primary purposes of punishment: retribution, deterrence, and incapacitation. Retribution is the subject of endless philosophical debates, see, *e.g.*, 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5(a)(6), p. 36, n. 44

(1986), while deterrence is the subject of empirical debates, *id.*, at 34, n. 27. Incapacitation, however, is not debatable. So long as five-time felon Earthy Daniels is confined in prison, he will not be breaking into the homes of law-abiding citizens, and he will not be robbing them, although he may commit crimes on other prisoners. Nor will anyone "take his place" committing robbery and burglary, because there is no fixed number of places to take. See Scheidegger & Rushford, 11 Stan. L. & Pol'y Rev., at 60.

If society is going to take criminals off the street, it can either do so indiscriminately by raising penalties across the board, or it can impose longer sentences on those it believes most likely to commit further crimes if released. The latter, selective approach is both less expensive to society and less severe in its treatment of those given the lesser sentences. "[P]unishing first offenders with twenty-five year sentences does not deter crime as much as it ruins lives." *Deal* v. *United States*, 508 U. S. 129, 146, n. 10 (1993) (Stevens, J., dissenting) (quoting *United States* v. *Jones*, 965 F. 2d 1507, 1521 (CA8 1992)). Both justice and efficacy require focusing on career criminals.

Research has long established that a fairly small percentage of criminals commit a disproportionate share of the crimes. H. R. Rep. 99-849, p. 2 (1986) (report on Career Criminal Amendments Act of 1986, summarizing research). One study noted that "incarcerating one robber who is above the 90th percentile for one year would prevent more robberies than incarcerating 18 offenders who are below the median for the same period of time." P. Greenwood, Selective Incapacitation 45-47 (1982).

Identification of the "high-rate" offenders is no small task, however. While they freely "self-report" in confidential interviews with researchers, *id.*, at 14-15, they are obviously not going to speak freely during sentencing. Furthermore, there are moral and constitutional restraints on the factors that can be used in sentencing. Even if research were to find a correlation

between growing up in a broken home and recidivism, for example, it would be obviously unjust to base a sentence on a factor beyond one's control.

Criminal record is the single most important factor in identifying the career criminal. Common sense, backed up by research, indicates that felons with multiple convictions are more likely to commit new crimes upon release.

> "It is a psychological truism that the best predictor of future behavior is past behavior. Not surprisingly, one of the best predictors of future criminal conduct is past criminal conduct, and the parole-prediction literature amply supports this fact. From the earliest studies [citations] to the latest [citations], indices of prior criminal conduct consistently are found to be among the most powerful predictors of parole violations, arrest for the commitment of new offenses, and conviction and reincarceration for these." Gottfredson & Gottfredson, Accuracy of Prediction Models, in 2 Criminal Careers and "Career Criminals" 239-240 (A. Blumstein ed. 1986).

Enhancement for prior convictions is based on an objective, previously adjudicated fact, and it is based on the defendant's voluntary, antisocial choice to commit the prior crime. The predictive power of a criminal record to forecast future recidivism is obviously far from perfect. See, *e.g.*, Greenwood, *supra*, at 66. However, there is no other factor for differentiating among people who have committed similar crimes which satisfies as well the concurrent requirements of objectivity, moral basis, and prediction of future recidivism. Consequently, every jurisdiction in the United States has enacted some kind of habitual criminal statute. *Parke* v. *Raley*, 506 U. S. 20, 26-27 (1992) (citing Department of Justice, Statutes Requiring the Use of Criminal History Record Information 17-41 (1991) (NJC-129846)). This Court has long recognized the states' strong and legitimate interest in punishing repeat offenders. *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Raley*, 506 U. S., at 27.

For a system based on prior crimes to be just and even-handed, it must reliably identify those prior crimes. A limitation to prior convictions, rather than unadjudicated prior conduct, is for the defendant's benefit even though the Constitution does not require this limitation. See *Nichols* v. *United States*, 511 U. S. 738, 747-748 (1994). But if the priors are thrown out on fortuitous circumstances having little or no connection with the defendant's guilt of the prior crime, then the evenhandedness of the system is compromised. For example, in *Parke* v. *Raley*, the Sixth Circuit had created a rule which, in effect, would throw out virtually all prior convictions where the transcript of the *Boykin*[3] colloquy had been lost, destroyed, or never made. This Court wisely rejected that rule. 506 U. S., at 30.

Congress has provided, in 28 U. S. C. § 2255, a mechanism for challenging criminal judgments on grounds which cannot be raised on appeal because they require facts outside the appellate record. See *United States* v. *Hayman*, 342 U. S. 205, 212 (1952) (habeas for "facts *dehors* the record"); *id.*, at 219 (scope of § 2255 intended to be the same as habeas). Claims which could have been raised on appeal, but were not, generally cannot be raised in a § 2255 proceeding. See *Reed* v. *Farley*, 512 U. S. 339, 354 (1994). Claims raised on appeal and resolved against the appellant will generally not be reconsidered as well. See *Kaufman* v. *United States*, 394 U. S. 217, 227, n. 8 (1969); *Withrow* v. *Williams*, 507 U. S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (collecting cases). Yet petitioner now proposes to convert this proceeding into an open-ended attack on *prior* judgments on grounds that were or could have been raised and decided long ago. In the typical case, the defendant has had or waived his appeal on the prior. He has filed or foregone his collateral attack, if he was incarcerated. He has been back on the street and committed a new felony, and *now* he wants to reopen the long-closed book

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3. *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

on the prior crime, placing a further burden on a system already groaning under a surfeit of litigable issues. Such a step would require an exceptionally compelling justification.

B. Striking Priors and Unjust Results.

"Striking" a prior conviction, so as to disregard it for sentencing purposes, is fundamentally different from reversing a judgment on appeal or even from granting habeas corpus relief. On appeal or habeas, the grant of relief typically does not, by itself, result in the defendant's release. The usual result is a retrial. A conviction may be more difficult to obtain after a long lapse of time, see *Vasquez* v. *Hillery*, 474 U. S. 254, 280 (1986) (Powell, J., dissenting), but it is quite often possible, particularly where the original case was strong.

Striking priors is different. The remedy typically sought is to resentence the defendant without considering the prior offense. See, *e.g.*, J. A. 51-52 (relief sought in District Court in the present case). From a finding of procedural irregularity alone, the defendant completely escapes the sentence-enhancing effect of his prior crime. He would be sentenced as a first offender regardless of how clear the evidence of guilt of the prior may be. This is a truly drastic remedy, and it can have disastrous consequences.

For example, in California the mid-term penalty for a first-offense rapist is 6 years, Cal. Penal Code § 264(a), with up to 15 percent worktime credit. See *id.*, § 2933.1(a). A second offense of forcible rape draws 25-to-life. See *id.*, § 667.61(a), (c)(1), (d)(1). Striking the prior means that a serial rapist who should have been locked up for life instead gets released in 5 years to brutalize more women.

The criminal career of Andre Brigham Young, presently before this Court in *Seling* v. *Young*, No. 99-1185, illustrates the dire consequences of failure to adequately punish repeat offenders. See *In re Young*, 857 P. 2d 989, 994-995 (Wash. 1993). Despite a prior conviction on four counts of rape,

Young served only three years for the fifth. The attack on victim number six should never have happened. The cause of this travesty was lax sentencing laws, but the same consequence would follow from a needlessly stricken prior conviction.

In *Parke* v. *Raley*, *supra*, 506 U. S., at 32, this Court noted the state's "legitimate interest in differentially punishing repeat offenders." Although true, this is a dry understatement. The "interest" here goes to the very lives of the people victimized by habitual criminals. Innocent people will be needlessly robbed, raped, and murdered if criminals who are, in fact, recidivists are wrongly sentenced as first offenders. That is what is at stake in this case.

II. Neither law nor justice requires the consideration of petitioner's claims.

In habeas cases, the statute requires the court to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Although § 2255 does not contain the same language, the same requirement is implicit from its purpose as a habeas substitute. See *supra*, at 7.[4] For claims which are not fundamental, neither law nor justice requires the reexamination of long-final judgments.

Res judicata is the general rule of the American legal system. A final judgment on the merits conclusively settles the claims and issues determined. See *Montana* v. *United States*, 440 U. S. 147, 153 (1979). An adverse determination is binding against the nonprevailing party in any court, regardless of how erroneous it may have been. In *Montana*, relitigation of a federal constitutional question was precluded even in this Court and even against the United States government. *Id.*, at

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4. On one point we agree with petitioner. There is no basis to give federal prisoners any less review under § 2255 than state prisoners receive under § 2254. See Brief for Petitioner 19. If there were to be any difference, federalism concerns would point the other direction.

164. Exceptions to the rule require strong justification. Existing exceptions should not be extended without careful consideration of whether the extension is warranted.

A. Judgments: Void, Voidable, Erroneous and Correct.

Judgments are not cleanly divided into "valid" and "invalid" judgments. Instead, they lie along a spectrum of vulnerability. At one end of the spectrum is the judgment which is absolutely void. Normally the only defect severe enough to cause absolute voidness is a lack of jurisdiction. Imprisonment under such a judgment would itself be a crime. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

At the other extreme are the vast majority of judgments. They have been validly rendered by courts of competent jurisdiction in proceedings free of reversible error. Such judgments will be affirmed if they are appealed and will be enforced in the face of any collateral attack.

The middle of the spectrum consists of judgments rendered erroneously by courts of competent jurisdiction. These judgments differ from each other in their degree of vulnerability. Some types of errors may be attacked at some stages of the process but not at others. A judgment may have been entered after the erroneous admission of an important piece of evidence. Such a judgment would be reversible on appeal. In most cases, however, it would not be vulnerable to collateral attack.[5] If no appeal is taken or if the judgment is affirmed on appeal, even erroneously, the judgment is no longer subject to question.

More fundamental defects will result in a judgment being "voidable," i.e., subject to being set aside in a collateral attack such as habeas corpus. Such a judgment is nonetheless "valid"

5. This is true even if the ground for exclusion is the Fourth Amendment. Such a claim will not be considered on federal habeas if the state provides an opportunity for full and fair litigation of the claim. *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976).

in the sense that executive officers may properly execute it until such time as it is actually set aside. The legislative branch may attach civil disabilities, enforceable by criminal sanctions, which also apply until the judgment is actually set aside. *Lewis* v. *United States*, 445 U. S. 55, 67 (1980) (firearm possession by felon).

The status of a judgment as "voidable" is not necessarily static. Upon successful completion of habeas corpus proceedings, the judgment becomes void rather than merely voidable. See *id.*, at 61, n. 5. On the other hand, the right to challenge a judgment may be lost by the passage of time, see 28 U. S. C. § 2244(d); Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, or by the failure to invoke the usual appellate remedies, see *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

B. Reliability and Procedural Defaults.

Petitioner repeatedly inveighs against "unconstitutional" prior convictions, as if "constitutional" and "fundamental" were synonymous. See Brief for Petitioner 7-15. Arguably, they should be. One might well argue that the detailed code of criminal procedure judicially engrafted on to the Bill of Rights, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156 (1970), should never have been promulgated. It is far too late in the day, though, to pretend that all the rules now considered constitutionally based are actually essential to the fundamental fairness of the trial. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

As Justice Stevens noted, the key to recognizing which rules really are essential to reliability of the result can be found in the jurisprudence of retroactivity. If compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were really essential to the reliability of trials in which confessions are used, why were all other defendants in then-pending cases denied the benefits of the decision? See *Johnson* v. *New Jersey*, 384 U. S.

719, 721 (1966). The reason is that the Court did not believe that noncompliance with its rule cast genuine doubt on the reliability of the guilt verdict. See *id.*, at 727-728 (distinguishing *Gideon* and *Jackson* v. *Denno*, 378 U. S. 368 (1964), which applied retroactively due to " 'clear danger of convicting the innocent' "). Ernesto Miranda, unlike Clarence Gideon, was convicted on retrial. See L. Baker, Miranda: Crime, Law and Politics 191-193 (1983). The defendants in the three joined cases were also reconvicted or plea bargained. See *id.*, at 191-192, n. *. That is why "it is familiar learning that all 'claims of constitutional error are not fungible.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 640 (1993) (Stevens, J., concurring).

Of all the constitutional rules which apply to the guilt phase of trial, the one which is least needed for reliability of the verdict is the Fourth Amendment exclusionary rule. See *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). The impact of this rule on reliability is actually negative. The runner-up in this category is the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969). To gauge the impact of *Boykin* on reliability, one need only ask any experienced trial judge how many defendants have changed their minds upon being "Boykinized" and decided to go to trial. Most will answer "none." Cases in which compliance with *Boykin* makes any difference at all to the outcome are exceedingly rare. Typically, the only effect of noncompliance with *Boykin* is to hand the defendant a ground for challenging a plea he would have entered anyway.

Along the same lines is the rule defendant seeks to invoke in this case, that the judge taking a guilty plea advise the defendant of the nature of the change. See Brief for Petitioner 2-3. In most cases, this exercise merely repeats what defense counsel has already told the defendant. See *Henderson* v. *Morgan*, 426 U. S. 637, 647 (1976). Defendant himself illustrates the disconnection of this rule from reliability of the result by asserting, "It does not matter if a defendant probably would have pled guilty anyway." J. A. 51. *Amicus* submits that

it matters in deciding whether to extend twice-removed collateral attacks to such claims.

The implicit theme of defendant's argument is that all constitutional claims must be considered at all stages of criminal proceedings. That is not the law. Claims drop off as the processes move on, and their impact on confidence in actual guilt is often a key factor. In answer to Judge Friendly's rhetorical question, innocence *is* relevant.

The exclusionary rule falls off first, because of its uniquely contra-reliability effect. See *Stone* v. *Powell*, *supra*, 428 U. S., at 490. Next come rules created after the date of finality of defendant's case on direct review which do not "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). Defendants with such claims are denied relief, and they remain in prison even though their convictions, in petitioner's terminology, are "unconstitutional." Then, strongly analogous to the present case, there are claims which could have been raised on appeal but were not. These are generally not cognizable on habeas, with an exception for actual innocence. See *Schlup* v. *Delo*, 513 U. S. 298, 326-327 (1995). Finally, there are claims in which the probability of a different result rises to the level of reasonable doubt but not to the level of substantial and injurious effect. These claims warrant reversal on direct appeal but not on habeas corpus. *Brecht* v. *Abrahamson*, *supra*, 507 U. S., at 638.

Collateral attack on a prior conviction, as opposed to the present conviction, is a step further removed, and it makes sense that fewer attacks be allowed at this very late stage. Again, impact on reliability should be the key. Defects in the prior proceedings have no impact whatever on the reliability of the present conviction. The specter of the imprisoned innocent man, which haunts so many habeas opinions, is absent here. The issue is only how long to imprison a criminal, not whether he *is* a criminal. The worst-case injustice on the defendant's side is an order of magnitude less than it is with guilt-phase

claims. Cf. *Schlup*, *supra*, 513 U. S., at 325-326 (contrasting claim of actual innocence with claim of "too severe" sentence).

The question, then, is where to draw the line on cognizable claims. Given the zero impact on reliability of the present guilt judgment, and given that the defendant could have challenged his priors when they were rendered, does it make any sense to open these judgments to the same full range of claims as are cognizable in a habeas attack on the present convictions? *Amicus* believes that question was asked and answered in *Custis* v. *United States*, 511 U. S. 485 (1994). The answer is no.

C. Custis v. United States.

When *Custis* v. *United States*, 511 U. S. 485 (1994) was being briefed and argued, the advocates involved understood that the case was about whether, not when, priors may be collaterally attacked. Defendant referred to the position of the Fourth Circuit and the government as a "prohibition on court review of nearly all constitutional violations." Brief for Petitioner in *Custis* v. *United States*, No. 93-5209, p. 25. The government argued, "At some point, a state court judgment becomes final and is *no longer open* to challenge on grounds that the defendant has not preserved." Brief for United States in *Custis* v. *United States*, No. 93-5209, p. 22 (emphasis added); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Custis* v. *United States*, No. 93-5209, pp. 2-3.

The *Custis* majority also saw the issue this way, as indicated by both the language of the opinion and the manner in which it addressed the constitutional precedents. On the constitutional question, the two principal precedents cited by defendant were *Burgett* v. *Texas*, 389 U. S. 109 (1967) and *United States* v. *Tucker*, 404 U. S. 443 (1972). See *Custis*, 511 U. S., at 493. If the case were about timing of challenges, these precedents would be quite different, while if it were about allowability they would be quite similar. In *Burgett*, defendant challenged the

use of priors on *Gideon*[6] grounds during the course of the trial, see 389 U. S., at 112, and the case came to this Court on direct appeal. See *id.*, at 110. *Tucker*, on the other hand, involved a proceeding under 28 U. S. C. § 2255, many years after the original conviction. See 404 U. S., at 445.

If the issue in *Custis* had been merely whether Custis could bring his challenge in the sentencing proceedings or had to delay them to a § 2255 motion, the only relevance of *Tucker* would have been to illustrate the propriety of the latter course. *Custis* would not have needed to distinguish *Tucker* on any basis other than the differing procedural positions of the two cases. Instead, though, the *Custis* Court treated *Burgett* and *Tucker* as equivalent on the point at issue. The Court distinguished both cases on the ground that they involved *Gideon* claims and that *Gideon* was a "unique constitutional defect." *Custis*, 511 U. S., at 496.

Custis took a further step toward recognizing that constitutional claims differ in their impact on fundamental fairness and that this difference ought to result in differing degrees of reviewability. This concept is highly controversial, and the members of this Court have differed sharply on it. Compare *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting) ("claims of constitutional error are not fungible"), with *Stone* v. *Powell*, *supra*, 428 U. S., at 515 (Brennan, J., dissenting) ("there are no 'second class' constitutional rights for purposes of federal habeas jurisdiction"). This step would have been completely unnecessary if the question had merely been a choice between sentencing and § 2255 as the vehicle for the challenge. Under well-settled law, there is nothing remotely unconstitutional about channeling constitutional challenges to one procedural vehicle rather than another. See, *e.g.*, *Yakus* v. *United States*, 321 U. S. 414, 443-444 (1944); *United States* v. *Hayman*, 342 U. S. 205, 223-224, and n. 40 (1952) (upholding § 2255's displacement of habeas corpus).

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6. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

If *Custis* had been merely a choice-of-procedure case, there would have been no need to distinguish *Gideon* claims from others, particularly on the basis of *Gideon*'s uniqueness and jurisdictional nature. See *Custis*, 511 U. S., at 496. Dividing constitutional claims in this manner without a need to do so would violate the principle that constitutional questions are not to be decided unless necessary to resolve the case, see *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585, 589-590 (1991) (quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1908)), and then no broader or more novel than necessary. See *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). *Custis* distinguished *Gideon* claims from others because it needed to. It distinguished *Tucker* on this basis, rather than the narrower and better-settled ground of *Yakus* and *Hayman*, because the question was allowability, not timing or procedure.

"Custis argues that regardless of whether § 924(e) permits collateral challenges to prior convictions, the *Constitution* requires that they be *allowed*." 511 U. S., at 493 (emphasis added). Any argument that the Constitution requires one vehicle rather than another would have been frivolous and would have been brushed off with a single paragraph. The argument made by Custis and rejected by the Court was that the Constitution requires some vehicle for attacking priors on non-*Gideon* grounds. "Custis invites us to extend the right to attack collaterally prior convictions used for sentenced enhancement beyond . . . *Gideon*. We decline to do so." *Id.*, at 496. Both by its terms and by its rationale, this holding applies to collateral attack generally, not to the choice of one collateral vehicle over another.

At the end of the opinion, *after* reaching this conclusion, the Court noted that a prisoner still in custody on a prior conviction could attack that prior on habeas. See *id.*, at 497. The Court reserved the question of whether a § 2255 motion would lie to reopen an enhanced sentence after such a prior had actually been vacated in another proceeding. See *ibid.* Nothing in this

passage says or implies that the § 2255 motion itself could be the vehicle for collaterally attacking the prior. The qualification that the prisoner must still be in custody under the prior very strongly implies the contrary.

The *Custis* Court did not mention the possibility of habeas attack on the state prior until after it had rejected Custis's argument. Nothing in its rationale depends on the circumstance of such an attack remaining available. The question reserved in this paragraph is whether a sentence can be reopened after the prior has otherwise been vacated, not whether a motion to vacate the present sentence can be used to collaterally attack the prior. The latter question is indistinguishable from the argument rejected in *Custis*.

D. Law and Finality.

In a state-prisoner habeas proceeding, the law authorizes relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). In federal prisoner cases, relief is authorized if "the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack . . . . " 28 U. S. C. § 2255. In the context of the present case, that means the same scope as § 2254. See *Kaufman* v. *United States*, 394 U. S. 217, 221-223 (1969) (§§ 2254 and 2255 have same scope for constitutional claims); *United States* v. *Frady*, 456 U. S. 152, 166, n. 17 (1982) (procedure default rule; finality interest same as state cases).

The question here is whether the government violates the Constitution by treating a final judgment as truly final and refusing to entertain a new attack on it. In other words, is res judicata unconstitutional? Even if *Custis* had not already answered the question, the answer would still be no.

The procedural default cases establish that a judgment may be regarded as legitimate despite an underlying constitutional

defect. The habeas petitioner "is in custody *pursuant* to a judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 730 (1991) (emphasis in original). If the state courts have legitimately refused to entertain an attack on that judgment because the claim has been defaulted, the judgment "rests on an adequate and independent state ground." *Ibid.* Despite the defect, the judgment is a "legitimate reason[ ] for holding the prisoner." *Ibid.* When the state has provided a means for reviewing judgments and the defendant has not used it, his custody is not in violation of the Constitution within the meaning of the habeas statute. See *Brown* v. *Allen*, 344 U. S. 443, 485 (1953).

Judgments on prior convictions should be treated similarly. When the jurisdiction rendering the judgment provides corrective process and the defendant does not invoke it within the time required, the judgment should stand as the conclusive resolution of the question of the defendant's guilt. For most constitutional claims, the end of custody will be the outer limit for bringing the claim, although the rendering jurisdiction may choose to entertain later claims. See *Johnson* v. *Mississippi*, 486 U. S. 578, 586-587 (1988) (sentence reopened after rendering jurisdiction set aside prior judgment).

In short, general principles of finality support treating final judgments as conclusive. An exception to the general principles would be warranted if there were compelling, countervailing considerations of fundamental justice. Cf. *Schlup* v. *Delo*, 513 U. S. 298, 321 (1995) (actual innocence as exception to procedural default). There are none here.

E. Basic Justice.

Faced with a claim of a procedural defect in a prior judgment, there are three possible responses: (1) entertain the claim and, if sustained, disregard the prior crime regardless of actual guilt; (2) refuse to entertain the claim, recognizing there is some possibility, however remote, defendant might be innocent of the prior crime; or (3) retry the question of guilt of the prior crime. The third alternative presents obvious difficulties of resources,

stale evidence, and often great inconvenience to far away witnesses.[7] If the choice is between the first two alternatives, the choice must depend in part on the degree to which a procedural defect undermines our confidence in the accuracy of the determination of guilt. Cf. *Teague* v. *Lane*, 489 U. S. 288, 313 (1989) (plurality opinion) (accuracy enhancing value as basis of distinguishing retroactive from nonretroactive rules); *Strickler* v. *Greene*, 527 U. S. 263, 289-290 (1999) (confidence in verdict as criterion for denying relief for nondisclosure of evidence).

Petitioner's claims in the present case illustrate why attacks on guilty pleas seldom undermine confidence in the defendant's actual guilt of the prior offense. He contends that his only involvement in the 1978 robbery was being in the getaway car. J. A. 52. Habeas petitioners as a group have long been notorious for saying whatever they need to say. See *United States* v. *Hayman*, *supra*, 342 U. S., at 217, n. 25. Daniels claims he did not know this was insufficient for guilt of robbery, his lawyer did not tell him, J. A. 53, and the transcript of the plea hearing is missing. J. A. 38, n. 3.

This story defies belief. This case does not involve some esoteric aspect of mens rea that scholars debate. This is a gut-level matter of culpability, or lack of it. Even the most uneducated person would recognize that basing guilt of a felony on merely being a passenger in a car is fundamentally wrong and would at the very least ask his lawyer about it. The likelihood that a person who was actually innocent under these circumstances would go ahead and plead guilty, and that his lawyer would allow him to, seems extremely remote.

Defendant's second attack does even less to undermine confidence in actual guilt. He claims ineffective assistance in

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7. Notwithstanding these difficulties, *amicus* suggests that, if the Court should decide to allow these attacks, defendant should be required to show that he is innocent of the prior offense by the preponderance of the evidence.

failure to make a suppression motion. J. A. 48. Justice Powell has questioned whether such claims establish "prejudice" even in an attack on the present conviction, see *Kimmelman* v. *Morrison*, 477 U. S. 365, 394-398 (1986) (opinion concurring in the judgment), an issue which has yet to be resolved. If the case for entertaining such claims in an attack on the present conviction is weak, the case for entertaining them in attacks on priors is nearly nonexistent. Such a claim does not undermine confidence in the correctness of the present judgment at all. Defendant is a habitual criminal regardless of whether a prior attorney missed an opportunity to obtain an undeserved windfall for him.

Petitioner notes, correctly, that defendants may forego attacking a conviction at the proper time because of a plea bargain. See Brief for Petitioner 21. Indeed, this is probably the single most prevalent reason for foregoing collateral attacks on convictions. The vast majority of convictions are guilty pleas. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 5.51, p. 454 (2000). Far from being an argument to entertain challenges to such priors, this is a reason *not* to entertain them.

A typical plea bargain involves a plea to a lesser offense or fewer offenses than the defendant actually committed or a stipulation to a sentence less than he would likely receive upon full proceedings. A defendant who does not receive such consideration has no tangible incentive to plead guilty. The obvious reason why the defendant does not attack the plea-bargain judgment is that he knows he has gotten off easy. If he overturns the judgment, he will likely be tried, convicted, and sentenced for the full measure of the crimes he actually committed.

The plea bargain is a mutual agreement of the defendant and the state to bring an end to the case. The state receives a termination of the case with a savings of its resources, and the defendant receives a termination of the possibility of the full sentence for the offenses originally charged. Finality concerns

have special force in guilty plea cases, *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979), in part because the danger of convicting an innocent person is vastly diminished. See *ibid.* In addition, the defendant has chosen to hasten the finality of the case, and he has typically received consideration for it.

The flood of extra attacks on sentences that petitioner envisions, see Brief for Petitioner 23-24, is unlikely to happen. It is not true that "all prisoners would be well-advised to mount every imaginable challenge." Cf. *id.*, at 24. Most would be subject to retrial on more charges, more serious charges, or heavier sentences if they succeeded in overturning their present judgments, and that consequence would typically outweigh the remote, contingent possibility that the conviction might someday be used for enhancement.

A person who has been wrongfully convicted has a simple and fully effective way to avoid the use of that conviction for enhancement. All he has to do is obey the law. If he does not commit a new offense, the prior will never be used for enhancement.

In summary, a fully expired prior conviction, which is attacked on grounds similar to those in the present case, and which the defendant never challenged when he had a procedure available, is highly unlikely to involve actual innocence of the prior conviction. It has no bearing whatever on guilt of the present offense and the interest in preventing injustice is greatly diminished when issues go only to sentence and not to guilt. The arguments that justify an exception to res judicata in other contexts are insufficient here. The general rule should apply. The final judgment should be regarded as conclusive and not reopened.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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